

**COMMENTS OF THE SECTION OF  
ANTITRUST LAW OF THE  
AMERICAN BAR ASSOCIATION  
IN ADVANCE OF THE  
FEDERAL TRADE COMMISSION HEARINGS  
ON COMPETITION AND CONSUMER  
PROTECTION IN THE 21<sup>ST</sup> CENTURY**

August 20, 2018

*The views expressed here are on behalf of the American Bar Association's Section of Antitrust Law and, for Topic 8, the Section of Intellectual Property Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and unless otherwise noted, should not be construed as representing the policy of the American Bar Association.*

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## **EXECUTIVE SUMMARY\***

On June 20, 2018, the Federal Trade Commission announced that it would conduct a series of 15-20 hearings throughout the Fall and Winter on the state of competition and consumer protection enforcement since a prior set of hearings in 1995. The Commission identified 11 topics as to which it was soliciting comments in advance of hearings, with the initial set of comments due August 20, 2018. The topics are:

1. The state of antitrust and consumer protection law and enforcement, and their development, since the Pitofsky hearings;
2. Competition and consumer protection issues in communication, information and media technology networks;
3. The identification and measurement of market power and entry barriers, and the evaluation of collusive, exclusionary, or predatory conduct or conduct that violates the consumer protection statutes enforced by the FTC, in markets featuring “platform” businesses;
4. The intersection between privacy, big data, and competition;
5. The Commission’s remedial authority to deter unfair and deceptive conduct in privacy and data security matters;
6. Evaluating the competitive effects of corporate acquisitions and mergers;
7. Evidence and analysis of monopsony power, including but not limited to, in labor markets;
8. The role of intellectual property and competition policy in promoting innovation;
9. The consumer welfare implications associated with the use of algorithmic decision tools, artificial intelligence, and predictive analytics;
10. The interpretation and harmonization of state and federal statutes and regulations that prohibit unfair and deceptive acts and practices; and
11. The agency’s investigation, enforcement and remedial processes.

In these Comments, which the Section of Intellectual Property Law joins as to Topic 8, the Section addresses each of the 11 topics and agrees with the Commission they are worthy of study. The Section also notes, however, the Commission might find it more appropriate to focus particularly on a narrow set of issues to give those issues the greater depth of analysis the Section believes they require. In particular, the Section suggests that the FTC focus on six issues:

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\* The members of the Section of Antitrust Law contributing to this paper are listed in the appendix.

- What is the continuing vitality of the consumer welfare standard in competition matters?
- What are the best methodologies and sources of data for the Commission to use in assessing the effectiveness of its competition and consumer protection enforcement decisions?
- What is the state of competition in the high-tech sector? How far does the *Amex* decision extend in terms of market definition?
- Are users given sufficient information about the data collected and a meaningful choice as to how the data might be used?
- What guidance can be provided with respect to the agency's analysis of vertical mergers, given recent case law and advances in economic thinking?
- Given the high and increasing costs and time of merger reviews and investigations under Part 2 of the Rules of Practice, what process improvements can be achieved to improve efficiency and reduce burden?

## **INTRODUCTION**

The Section commends the Federal Trade Commission for its decision to launch these hearings. As Chairman Simons noted in his June 20, 2018 remarks announcing the hearings, the agency has important tools and a broad mandate “to gather leaders in business, economics, law, and related disciplines to discuss tough, emerging problems and prepare public reports on the facts, issues, governing law, and the need, as appropriate, for change.” Doing so enables the Commission to “stay informed of market developments, shape [its] policy agenda, and identify opportunities to develop the law consistent with its enforcement authority.”<sup>1</sup> Throughout its history, the agency has used these tools to produce a trove of influential reports, many of which have had a significant impact on the agency's enforcement program as well as national and international policy

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<sup>1</sup> See Joseph Simons, Chairman, Fed. Trade Comm'n, Prepared Remarks Announcing the Competition and Consumer Protection Hearings (June 20, 2018); *see also* William Kovacic, An Enhanced Markets Regime for the United States (Apr. 12, 2018) (presented at the 2018 Spring Meeting of the Section of Antitrust Law).

discussions.<sup>2</sup> As the Commission’s announcement pointed out, the 1995 Pitofsky Hearings and subsequent 1996 Pitofsky Report<sup>3</sup> were sterling examples of this tradition. They represented an ambitious and timely effort to ascertain where and how the agency could best focus its resources to address current and impending issues affecting U.S. consumers.

The June 2018 call for comment initiated what will be an equally ambitious effort. Eleven topics have been identified by the Commission for potential study. All are important and worthy of careful consideration. However, based on the experience of the Section in commenting to the Antitrust Modernization Commission (“AMC”), as well as the experience of our Chair and Immediate Past Chair on the AMC, we add a note of caution over the breadth of the Commission’s inquiry. At the outset, the AMC – which had three years, rather than nine months – narrowed the list of subjects for more thorough review. This narrowing led to more focused hearings, better submissions from interested parties, and a docket that permitted careful evaluation of each of the various topics selected. A similar approach might be beneficial to the Commission.

The Section has identified the following issues that, in our view, should be high on the list of priorities.

- What are the best methodologies and sources of data for the Commission to use in assessing the effectiveness of its competition and consumer protection enforcement decisions?

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<sup>2</sup> See, e.g., FED. TRADE COMM’N, SUMMARY REPORT ON HOLDING AND OPERATING COMPANIES OF ELECTRIC AND GAS UTILITIES, S. Doc No. 92, 74th Cong., 2d Sess. (1935); FED. TRADE COMM’N, REPORT ON THE MERGER MOVEMENT: A SUMMARY REPORT (1948); FED. TRADE COMM’N, BUREAU OF ECONOMICS STATISTICAL REPORT: ANNUAL LINE OF BUSINESS REPORT 1973 (March 1979); FED. TRADE COMM’N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (2003); FED. TRADE COMM’N, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (2004).

<sup>3</sup> FED. TRADE COMM’N, ANTICIPATING THE 21ST CENTURY: COMPETITION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE 2 (May 1996) (hereinafter “Pitofsky Report”).

- What is the state of competition in the high-tech sector? Specifically, what are the key parameters with respect to competitive dynamics, and what are the implications of the *Amex* decision for market definition in multiple-sided markets where the interactions of the two sides are essential but not simultaneous? How far does the *Amex* decision extend, and which externalities are relevant?
- With data playing an increasingly vital role in all facets of the economy, are users given sufficient information about the data collected and a meaningful choice as to how the data might be used? How best can the Commission incorporate economic analysis into its privacy and consumer protection enforcement?
- What guidance can be provided with respect to the agencies' analysis of vertical mergers, given recent case law and advances in economic thinking?
- Given the high and increasing costs and time of merger reviews and investigations under Part 2 of the Rules of Practice, what process improvements can be achieved to improve efficiency and reduce burden?

In addition, we recognize the international debate on the continuing vitality of the consumer welfare standard in light of concerns over income inequality, aggregate concentration, and employment. The Section believes there is little to no evidence or reason to believe that any other standard would be more effective and that these other concerns, while important, are best addressed through means other than competition enforcement. The consumer welfare standard has generated optimal competition outcomes for decades, and these other concerns do not warrant adoption of some new, necessarily unproven, possibly harmful, construct. Nevertheless, as some are questioning the standard, we believe the Commission can provide a significant service by examining the standard and either (as we recommend) explaining its continued vitality and/or making such modifications as may be necessary to protect consumers.<sup>4</sup>

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<sup>4</sup> See generally Jonathan Jacobson, *Another Take on the Relevant Welfare Standard for Antitrust*, ANTITRUST SOURCE (Aug. 2015).

In the balance of this submission, the Section addresses the eleven topics the Commission identified, with observations as to what specific inquiries would best aid the Commission in this process. The Section appreciates that the call for comment has initiated a process that will include hearings and testimony, as well as supplemental submissions prior to individual hearings and following the conclusion of the hearings. The Section looks forward to participating at each stage of this worthwhile process.

**Topic 1:      The state of antitrust and consumer protection law and enforcement, and their development, since the Pitofsky hearings.**

Notwithstanding current criticisms of the deficiencies in the antitrust laws and their enforcement in the context of today’s complex digital economy, in general we believe antitrust and consumer protection law and enforcement are in good shape and that no dramatic changes are warranted. The flexibility of the antitrust and consumer protection laws, especially to the extent that much of the interpretation has been left up to the courts and the enforcement agencies, has enabled antitrust to withstand the test of time—regardless of the political and popular climate. We note that the Antitrust Modernization Commission reached essentially the same conclusion in 2007.<sup>5</sup>

However, there are aspects of antitrust and consumer protection law and enforcement that could not have been contemplated by the original “Trustbusters” at the turn of the 20th Century or even by those participating in the Pitofsky Hearings at the turn of the 21st Century. The Pitofsky Hearings occurred in a period of optimism. Partly, although not solely, due to the dissolution of the Soviet Union, numerous countries were actively seeking to transition from state-controlled

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<sup>5</sup> ANTITRUST MODERNIZATION COMMISSION, REPORT & RECOMMENDATIONS (2007), [goo.gl/dt59no](http://goo.gl/dt59no) (hereinafter “AMC Report”).



economies to western-style markets protected by competition policy. Globalization and rapid innovation offered the promise of prosperity. Witnesses testifying during the Pitofsky Hearings noted and stressed these trends and described the beginnings of the opportunities the Internet would offer consumers.

The world has changed. The wrenching global financial crisis that began in 2008 shook confidence in the existing system and led to widespread economic insecurity. Globalization has been called into question. Meanwhile, witnesses in the Pitofsky Hearings and the Pitofsky Report writers did not anticipate, and could not have anticipated, the effect of subsequent technological developments on daily life. Although acknowledging that the Internet would soon provide consumers “in a global marketplace” with greatly expanded shopping opportunities and information, the authors of the report believed that “The Internet probably will not replace more traditional marketing vehicles.”<sup>6</sup> It is hardly an exaggeration to say that, for a large number of Americans today, the Internet and technology built on the Internet have not only “replaced more traditional marketing vehicles,” but also created a comprehensive new economic and social ecosystem. This ecosystem affects how companies compete and how consumers interact with them. These developments present potential challenges for competition and consumer protection policy.

Consumer welfare as a goal—or the standard—has been the guiding principle since the Supreme Court’s 1977 decision in *Sylvania*<sup>7</sup> and it should remain the goal going forward. To the FTC, this has meant that the antitrust laws must create “strong incentives for businesses to operate

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<sup>6</sup> Pitofsky Report Vol. II, *supra* note 3, at 2.

<sup>7</sup> *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

efficiently, keep prices down, and keep quality up.”<sup>8</sup> The Section believes that current antitrust and consumer protection law and enforcement do not require a radical overhaul to be effective in meeting the demands of the new economy, evolving business practices, new technologies, and international developments. Rather, such laws and enforcement should reject rigid frameworks and instead continue to embrace a flexible approach that adapts to rapidly changing markets, products, and business environments.<sup>9</sup> A circumstance-specific approach should allow the FTC to pursue the policy goal best suited to the particular market or conduct.

**A. The Commission should identify the best data sources and methodologies to assess its performance.**

The FTC commendably has engaged in a number of significant retrospective analyses over the past several years.<sup>10</sup> The 2004 Health Care Retrospective,<sup>11</sup> for example, analyzed the agency’s losses in sound hospital merger challenges, and contributed to the Commission’s successful turnaround in the years that followed.

To make these retrospectives even more effective, the Section recommends that a portion of the upcoming hearings be devoted to the optimal sources of data and the optimal methodological tools to make these assessments. How do we know if a merger (or conduct) case win protected

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<sup>8</sup> Fed. Trade Comm’n, *The Antitrust Laws*, FTC.GOV, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Aug. 1, 2018).

<sup>9</sup> See AMC Report, *supra* note 5, at 31-46; Jonathan Jacobson, *Do We Need a “New Economy” Exception for Antitrust*, ANTITRUST 89 (Fall 2001).

<sup>10</sup> See, e.g., Prepared Remarks of Edith Ramirez, Chairwoman, Fed. Trade Comm’n, Retrospectives at the FTC: Promoting an Antitrust Agenda (June 28, 2013), [goo.gl/Vx9MDg](https://www.ftc.gov/recordings-and-testimony/edith-ramirez-chairwoman-ftc-retrospectives-at-the-ftc-promoting-an-antitrust-agenda); FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (July 2004), [goo.gl/Z1QBcm](https://www.ftc.gov/recordings-and-testimony/improving-health-care-dose-of-competition).

<sup>11</sup> FEDERAL TRADE COMM’N & U.S. DEP’T OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION: (2004), <https://www.ftc.gov/sites/default/files/documents/reports/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice/040723healthcarerpt.pdfcm>.

consumers? What decisions not to challenge have been successes, and which have been mistakes? What measures of consumer value should be included in the calculus? Have allegations advanced in consumer protection cases been supported by subsequent facts? Has the Commission realized its objectives in these cases or have companies figured out clever evasions? The current hearings provide a unique opportunity to consider these and related questions, with the objective of improving depth of information informing the Commission's approach.

**B. The Commission should evaluate competitive conditions in the high-tech sector to determine whether increased competition enforcement would be useful.**

In 1995, when the Pitofsky hearings were held, Windows 95 was just being introduced. There was no widespread broadband, no iPhone or iTunes, no Facebook, no Netflix, no Google, and almost no one had heard of Amazon, created just a year before.

The now-large platform technology companies that have led this revolution have become controversial. Some have called for major antitrust law enforcement changes in the U.S. to rein them in, opposing what they see as too much discretionary power in the hands of a few.<sup>12</sup> Others have said that these firms have added great wealth to the overall economy, creating many thousands of business opportunities for others that would not otherwise exist, and have led to lower prices, great innovation, and enhanced quality and quantity.<sup>13</sup> Outside the United States, some authorities have pursued Google, Facebook, Apple, and Amazon under an abuse of dominance standard that some would say is inconsistent with modern economics and consumer welfare. In the United States, in contrast, successful competition law challenges have been quite rare, in part due to the Supreme

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<sup>12</sup> See Lina Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017).

<sup>13</sup> See, e.g., David S. Evans, *Why the Dynamics of Competition for Online Platforms Leads to Sleepless Nights But Not Sleepy Monopolies* (SSRN No. 3009438, 2017), <https://ssrn.com/abstract=3009438>.

Court's decisions in *Trinko*<sup>14</sup> and *linkLine*,<sup>15</sup> which permit a significantly narrower scope for dominance claims by focusing on the effects on consumers rather than the number of competitors.<sup>16</sup>

Given high-tech's importance to the future growth of the economy, gaining a better understanding of the different aspects of competition in these markets will be important to inform future enforcement decisions. Sound enforcement policy requires a good understanding of how these companies compete and innovate and how enforcement may affect that competition and innovation. Is a given acquisition of a startup by a large platform company likely to add new features to the platform's offerings to the benefit of consumers or will it unnecessarily eliminate important "nascent" competition? Is the collection of user data an efficiency or is it better characterized as a barrier to entry? Other important considerations – *e.g.*, cross-platform efficiencies, how to assess competitive effects in markets where products are free – will flow from this analysis. An especially important part of this inquiry will be the impact of the recent *Amex* decision on market definition and market power analyses, as addressed below under Topic 3.

**C. The consumer welfare standard continues to be the correct framework to assess competitive effects of mergers and conduct, but the implementation of this standard could be more nuanced in particular cases or markets.**

The FTC's stated goal in enforcing antitrust and consumer protection laws has long been to "promote vigorous competition and protect consumers from anticompetitive mergers and business

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<sup>14</sup> See *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

<sup>15</sup> See *Pacific Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (2009).

<sup>16</sup> *Pacific Bell Tel. v. linkLine Commc'ns*, 555 U.S. 438 (2009); *Verizon Comm'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

practices.”<sup>17</sup> Its mission is to ensure “the best possible functioning of free markets – competition among producers and accurate information for consumers [to] generate the best products at the lowest prices, spur efficiency and innovation, and produce benefits for consumers, workers and investors alike.”<sup>18</sup>

To achieve these ends, it is commonly understood that the FTC measures its actions against the consumer welfare standard: the “proposition that antitrust policy should encourage markets to produce output as high as is consistent with sustainable competition, and prices that are accordingly low.”<sup>19</sup> That is, the FTC focuses on ensuring the maximum output at the minimum price.

Although a singular focus on price effects could omit important pieces of the FTC’s mission, such as quality and innovation,<sup>20</sup> “output,” properly construed, should encompass all aspects of competitive value and care should be taken to make sure it does. Low prices are not mutually exclusive with quality or innovation, but these benefits do not always follow each other either, and sometimes may even move in opposing directions. For instance, in a market that experiences high start-up costs or other impediments to entry, an acquisition of a new, pioneering firm by an established giant may lower prices but also can diminish innovation. The expansion beyond price as the ultimate measure of consumer welfare is particularly important in the context of platform

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<sup>17</sup> Fed. Trade Comm’n, *Guide to Antitrust Laws*, FTC.gov, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws> (last visited Aug. 1, 2018).

<sup>18</sup> Pitofsky Report Vol I, *supra* note 3, at 2.

<sup>19</sup> HERBERT J. HOVENKAMP, IS ANTITRUST’S CONSUMER WELFARE PRINCIPLE IMPERILED? (2018), [https://scholarship.law.upenn.edu/faculty\\_scholarship/1985/](https://scholarship.law.upenn.edu/faculty_scholarship/1985/).

<sup>20</sup> The Section understands that “quality” can be difficult to measure and may involve subjective criteria rather than measurable data. *E.g.*, Jacobson, *supra* note 4, at 7. But the fact that a value may be hard to quantify does not mean it should be ignored.

services where consumers pay nothing to use them. The consumer welfare standard thus may require nuance and flexibility depending on the particular facts in each case to sufficiently assess the competitive effects of conduct in all markets.

The Section encourages the FTC to explore options that would allow the agency to adapt its analysis to goals specific to each market, provided the goals are consistent overall under the consumer welfare umbrella.<sup>21</sup> Even if such alternative approaches produce higher prices in some cases in the short term, the Section urges the FTC to study whether these short-term price increases could develop with non-price related pro-competitive benefits that would outweigh negative price effects (for non-per se offenses). The Pitofsky Report stated that, “Competition is fueled by innovation, as well as price . . . .”<sup>22</sup> Promoting innovation and quality, though, may require antitrust policy that looks beyond immediate price regulation to instead directly (or more intentionally) encourage innovation and quality and thus achieve long-term pro-competitive benefits for consumers.<sup>23</sup> As discussed in Topic 6 below, protecting important *potential* competition will be especially important in this regard.

Contemplation of potential competition in a more robust way is not a new idea. The FTC considered “potential competition” in the Pitofsky Report, and emphasized the harm occurring if

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<sup>21</sup> See Mark Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principles Underlying Antitrust Rules*, 73 ANTITRUST L.J. 435 (2006).

<sup>22</sup> Pitofsky Report Vol. I, *supra* note 3, at 35.

<sup>23</sup> The Section believes that other potentially laudable policy goals—such as stable labor markets, diversity in political discourse, and, at least broadly, a reduction in income inequality—are not well addressed directly by the antitrust agencies and thus should not be incorporated into an antitrust analysis. See ROBERT BORK, *THE ANTITRUST PARADOX* chs. 2-3 (1978); Jacobson, *supra* note 4, at 4. To the extent these goals are consistent with antitrust policy, as they often are, application of the consumer welfare standard will further them.

“consumers . . . lose the price competition that would have occurred if the product of the innovation had entered either a current or a future goods market.”<sup>24</sup> In its current evaluation of the importance of potential competition, the FTC should consider more than just innovation as a pro-competitive precursor of price effects. The Section encourages the FTC to study how our understanding of an innovative markets has evolved in the two decades since the Pitofsky Hearings. It is possible that such markets no longer depend on certain factors to achieve innovation (e.g., company size and resources) that informed the Commission’s prior focus on price effects. The Section also encourages the FTC to consider innovation as a potential standalone pro-competitive benefit and how it can provide additional economic benefits, such as job opportunities, economic growth, or increases in quality.

**D. The FTC should continue to push for greater transparency in enforcement standards among international enforcement agencies.**

This issue, sometimes framed in “due process” terms, has been high on the agenda of the antitrust community and the antitrust agencies for many years.<sup>25</sup> The FTC has devoted significant and fruitful effort to this issue in its Technical Assistance programs, both on a bilateral basis and through the ICN and OECD. The Section encourages the agency to continue to put this issue on the table in international discussions. Unfortunately, the current political environment may pose some challenges. DOJ reportedly has been confronted with some resistance to its recent proposals for a new, focused multilateral initiative to develop an international accord on procedural norms for

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<sup>24</sup> Pitofsky Report Vol. I, *supra* note 3, at 23.

<sup>25</sup> See Christopher Hockett, *Antitrust and Due Process*, 28 ANTITRUST 159 (2014).

antitrust enforcement.<sup>26</sup> The Section welcomes continued efforts to assure fair treatment for U.S. companies and reduce unnecessary delay and burden in merger review and other investigations.

#### **E. Clearance.**

The Section believes the clearance process with DOJ can be improved and made more transparent. The issues are addressed under Topic 11 below.

#### **Topic 2: Competition and consumer protection issues in communication, information and media technology networks.**

On December 14, 2017, the Federal Communications Commission (“FCC”) voted to adopt the Restoring Internet Freedom Order (hereinafter, “net neutrality regulations” or “FCC Order”), which reinstated the classification of broadband Internet access service as an “information service,” and thereby reversed a decision in 2015 to classify that service as a “telecommunications service” subject to common carrier regulation under Title II of the Communications Act of 1934, as amended.<sup>27</sup> Given the common-carrier exemption in the FTC Act, the reclassification of broadband as an information service appears to have restored the FTC’s jurisdiction over ISPs, which would enable the Commission to provide broad oversight of all participants in the Internet ecosystem.<sup>28</sup> The FCC Order also repealed a set of *ex ante* net neutrality regulations that had been adopted in 2015 pursuant to the FCC’s Title II authority, and replaced them with a strengthened set of

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<sup>26</sup> See, e.g., Michael Acton et al., *US DOJ’s Plans for Global Antitrust Standards Meet With Cool EU Response*, MLEX GLOBAL ANTITRUST (July 17, 2018).

<sup>27</sup> *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 ¶ 20 (2018).

<sup>28</sup> See *id.* ¶ 141.



transparency obligations requiring ISPs to disclose any blocking, throttling, or paid prioritization conduct.<sup>29</sup>

The FCC Order observed that ISPs generally had already made commitments never to engage in such anticompetitive or unreasonably discriminatory conduct online, and made clear that the FTC would have authority under Section 5 of the FTC Act to hold ISPs to those commitments and take action in the event that an ISP acted unfairly or anticompetitively.<sup>30</sup> Additionally, the FCC Order explained “[t]hese long-established and well-understood antitrust and consumer protection laws” administered by the FTC “are well-suited to addressing any openness concerns, because they apply to the whole of the Internet ecosystem, including edge providers, thereby avoiding tilting the playing field against ISPs and causing economic distortions by regulating only one side of business transactions on the Internet.”<sup>31</sup> The FCC and FTC subsequently entered into a Memorandum of Understanding that clarifies each agency’s responsibilities in carrying out this federal policy approach.<sup>32</sup>

Clarification of the FTC’s jurisdiction, enforcement plans, and policies regarding net neutrality is of particular interest to the Section. To facilitate transparency among consumers, businesses, and enforcers, the Section recommends that the FTC study and report its findings on its authority with respect to the regulation of Internet access services, the conduct of edge providers,

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<sup>29</sup> See *id.* ¶¶ 207-08.

<sup>30</sup> See *id.* ¶ 244.

<sup>31</sup> *Id.* ¶ 140.

<sup>32</sup> See Restoring Internet Freedom: FCC-FTC Memorandum of Understanding, Dec. 14, 2017, [https://www.ftc.gov/system/files/documents/cooperation\\_agreements/fcc\\_fcc\\_mou\\_internet\\_freedom\\_order\\_1214\\_final\\_0.pdf](https://www.ftc.gov/system/files/documents/cooperation_agreements/fcc_fcc_mou_internet_freedom_order_1214_final_0.pdf).

and any plans to enforce competition and consumer protection laws in the wake of the repeal of the FCC's net neutrality regulations. Among other things, it would be beneficial for the FTC to provide its views on potential anticompetitive conduct online and how best to ensure a level playing field.

**A. Potential anticompetitive effects from discriminatory treatment.**

Following repeal of most net neutrality regulations, some have expressed concerns that ISPs or large edge providers could engage in certain forms of potentially harmful discrimination. As Chairman Simons recently testified before the Senate Financial Services and General Government Subcommittee hearing on May 17, 2018, "paid prioritization, blocking, and throttling of Internet content by ISPs that might advantage or disadvantage particular parts of the Internet could be seen as unfair practices." Similar conduct by other online players, such as large edge providers, may also advantage or disadvantage particular parts of the Internet and could be unlawful if substantial market foreclosure is shown. "Paid prioritization" reflects the notion that ISPs and other marketplace participants could create "fast lanes" for companies and consumers who pay premiums and "slow lanes" for those who do not; "blocking" refers to online players discriminating against content by blocking that content entirely; and "throttling" refers to slowing the transmission of data based on the nature of the content or company-imposed thresholds. While discrimination is not necessarily harmful to competition, and often is itself a form of competition, these practices warrant further analysis by the FTC to determine whether consumers are likely to be harmed, and whether an enforcement or regulatory solution is warranted. The ISP pledges not to discriminate will be relevant to that inquiry.

With the FCC's order, the FTC will be applying the same rules to ISPs that it applies to everyone else. These issues have surfaced recently in the media industry, where there has been significant merger activity among content creators and content distributors. Recent examples (in

DOJ cases) include Comcast's acquisition of NBC, AT&T's acquisition of Time Warner, and Disney's planned acquisition of Fox assets. Although vertical integration generally produces pro-competitive benefits, it can also alter businesses' incentives. For example, large edge providers could favor some distributors over others, or vertically-integrated companies that control both content and its distribution might advantage their own content or disadvantage their rivals' content. That could lead to exclusionary effects in some cases by diverting subscribers of rival content to the vertically integrated company's own content, potentially foreclosing competitors. *Trinko* and *linkLine* make clear that unilaterally favoring one's own properties is perfectly lawful in the United States. But when the ability to discriminate anti-competitively is likely to be created through acquisition, the Commission has ample power to go to court to stop the deal.

**B. Potential consumer protection issues.**

The repeal of most net neutrality regulations may also give rise to new consumer protection issues. The FTC issued a complaint against AT&T Mobility on October 28, 2014, alleging that AT&T had engaged in deceptive advertising and unfair conduct by marketing certain mobile packages as "unlimited," but imposing data throttling programs once customers reached a predetermined data usage threshold.<sup>33</sup> On February 26, 2018, the Ninth Circuit ruled that the suit against AT&T could proceed, holding that the FTC has jurisdiction over a business's non-common carrier activities, even if the company otherwise operates as a common carrier (and thus is exempt

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<sup>33</sup> Complaint, FTC v. AT&T Mobility LLC, No. 3:14-cv-04785-EMC (N.D. Cal. filed Oct. 28, 2014).

from FTC oversight in that capacity).<sup>34</sup> Thus, the recent FCC Order is believed to confirm the FTC’s jurisdiction over fixed and mobile broadband.

While it appears that broadband providers can no longer invoke the FTC Act’s common-carrier exemption, the repeal of most net neutrality regulations raises new issues and questions. How will the repeal affect the FTC’s enforcement plans and policies going forward, now that its jurisdiction over ISPs is on firmer ground? What type of conduct post-repeal will the FTC view as an unfair or deceptive act or practice? For example, how will the Commission view offers by ISPs based on new tiers of service under a paid prioritization model? And how will large edge provider solicitations and conduct be analyzed?

The FCC Order requires ISPs to disclose considerable information to broadband consumers, including “accurate information regarding the network management practices, performance, and commercial terms” of their broadband services.<sup>35</sup> How will the Commission apply these requirements? Will similar disclosures be required of edge providers or others? The Section recommends that the FTC clarify its view of its jurisdiction over ISPs and other participants in the Internet ecosystem and analyze and report on the application of both competition and consumer protection law to potential discrimination or other anticompetitive conduct.

The FTC’s oversight of participants in the Internet marketplace—whether ISPs, platform providers, content delivery networks, or others—should turn on an assessment of the particular conduct at issue and its competitive and consumer-welfare effects. The FTC has previously

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<sup>34</sup> *FTC v. AT&T Mobility LLC*, 883 F.3d 848 (9th Cir. 2018) (en banc). *But cf.* *FTC v. Miller*, 549 F.2d 452 (7th Cir. 1977) (declining to reach the issue).

<sup>35</sup> *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 ¶ 215 (2018).

recognized that differentiation among customers (e.g., via various forms of prioritization) can be procompetitive or anticompetitive. And different marketplace participants may have varying incentives and abilities to engage in discriminatory conduct or behaviors that affect privacy and other values. The FTC should objectively apply its competition and consumer protection principles to all competitors, rather than singling out different segments to increased (or diminished) scrutiny.

### **C. Vertical mergers.**

Media and technology markets have been and will continue to observe significant vertical mergers. The associated issues are addressed below under Topic 6.

**Topic 3: The identification and measurement of market power and entry barriers, and the evaluation of collusive, exclusionary, or predatory conduct or conduct that violates the consumer protection statutes enforced by the FTC, in markets featuring “platform” businesses.**

Digital firms can disrupt existing ways of doing business by developing and using platform business models. Ride-sharing services are illustrative. These services provide apps that connect drivers and riders but do not own or operate vehicles, may not employ drivers, and do not directly transport customers. They also can be characterized by network effects across the platform—that is, the more drivers that use a ride-sharing service, the more valuable it is to riders; conversely, the more riders that use the ride-sharing service, the more valuable it is to drivers. Defining relevant markets in these “platform markets” – multi-sided markets that embody network effects across the platform – has represented a persistent challenge for antitrust analysis.

As multi-sided platforms have grown in economic importance, courts and competition authorities have grappled with how to assess the competitive effects of their business conduct. Multi-sided platforms differ from traditional, single-sided firms in two ways. First, multi-sided platforms connect at least two distinct groups that interact with each other through the platform.

Second, the groups can exhibit indirect network effects where the value of the platform to one group depends on the actions or number of participants in the other group.

For example, consider an online marketplace in which individuals can buy and sell goods. This type of marketplace becomes more valuable to buyers as the number of sellers increases because there are more items available for purchase. At the same time, the platform becomes more valuable to sellers as the number of buyers increases because there are more potential customers. Conversely, the platform becomes less valuable to one side as membership on the other side decreases. This interdependency can trigger a “feedback loop” when membership of one side of the platform grows or shrinks.

Assume the online marketplace raises the fee or commission it charges sellers to post their goods. If some of those sellers leave, the platform becomes less valuable to the buyers, who in turn also leave, further reducing the platform’s value to the remaining sellers, and so on. While these dynamics may be reversible, they can also tip a platform to failure. Where each side’s indirect network effects are of similar strength, the threat of a feedback loop is potentially greater as the platform’s value to each side is more closely tied to the size of the other side.

Market definition in most cases will be unchanged. In those limited instances where the claim involves a multi-sided market, however, market definition cannot be fully understood or analyzed without a clear understanding of the interaction between the different sides. In multi-sided markets, there can be important demand externalities between one side of the market and the other sides. Conduct that might appear anticompetitive if one focuses on one side of the market might be viewed as benign or procompetitive when all sides of the market are taken in to account.

How should market definition be analyzed in multi-sided markets? Traditional tools for market definition, such as the SSNIP and critical loss tests, if applied to only one side of the market, can cause the market to be defined either too narrowly or too broadly if there are significant, positive demand feedbacks.<sup>36</sup> For example, a SSNIP may be profitable on one side of a market if one assumes that prices on the other side of the market will not change, but once one allows for a price increase on one side of the market to feedback to the other side (e.g., the price increase on one side causes the demand on the other side to fall, which in turn causes the demand in the first market to fall as well), a SSNIP may no longer be profitable. However, if these demand externalities are small or one-sided, or if the particular conduct in issue affects only (or predominantly) one side, analyzing each side of the multi-sided market separately may be appropriate.

The Supreme Court’s June 2018 decision in *Ohio v. Am. Express Co.*, 585 U.S. \_\_ (2018) (“*Amex*”) appears to resolve one central question: does a plaintiff’s showing of anticompetitive effects on one side of a multi-sided market suffice to shift the burden of proving offsetting benefits to the defendant, or must the plaintiff show that the defendant’s conduct is harmful taking account of all sides of the market? Over a vigorous dissent by Justice Breyer, a 5-4 majority held that where two sides of a market are linked by strong “indirect network effects,” and where transactions require the simultaneous participation of both sides, the plaintiff cannot meet its burden by showing harm to only one side of the market. The majority of the *Amex* Court determined there were sufficiently substantial indirect network effects to require an analysis of both sides of the market, and not just one side as the Department of Justice had argued. The basis for this determination was that credit-

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<sup>36</sup> David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multi-Sided Platform Businesses* 21-22 (NBER Working Paper No. 18783, Feb. 2013).

card networks are “transaction” platforms “because credit-card networks cannot make a sale unless both sides of the platform simultaneously agree to use their services.”<sup>37</sup> As such, “they exhibit more pronounced indirect network effects and interconnected pricing and demand.”<sup>38</sup>

The *Amex* decision provides some guidance on how the agencies should define the relevant market and evaluate anticompetitive effects for multi-sided platforms that, like credit-card networks, exhibit strong, cross-directional, indirect network effects. Where sufficiently strong network effects exist, courts and enforcement agencies should consider the entire platform.<sup>39</sup> As the Court majority put it, “due to indirect network effects, two-sided platforms cannot raise prices on one side without risking a feedback loop of declining demand.”<sup>40</sup> A price increase on one side might be offset by increased benefits to the other, an effect that would be missed if plaintiffs only had to show harm to one side of the market. For platforms with substantial indirect network effects, a price increase for one side of the market does not suggest an anticompetitive effect without evidence of increasing the overall cost of the platform to all customer groups considered together.<sup>41</sup> The Court made clear that its ruling does not apply where network effects are weak or one-sided, but did not attempt to classify any platform other than the credit-card network at issue in the case.

Going forward it will be important for courts and regulators to test the strength of indirect network effects for various types of advertising-supported platforms. Courts and regulators will need to determine whether online or television platform users are similarly “indifferent” to the

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<sup>37</sup> See *Ohio v. Am. Express Co.*, No. 16-1454, slip. op. at 2 (June 25, 2018).

<sup>38</sup> *Id.*

<sup>39</sup> See *id.* at 12.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*



quantity of advertising to which they are exposed. Indeed, evidence exists that online users and TV viewers may care a lot about the quantity of advertising that accompanies their content. Similarly, users may benefit from (or at least be more tolerant of) higher quality advertising that is more interactive and better targeted.<sup>42</sup> In addition, most online advertising provides an intermediation service by permitting users to learn more about a product or make a purchase by clicking on the ad. This means that television and online platforms with targetable or interactive advertising capabilities may exhibit cross-platform network effects that are stronger than those in traditional newspaper or radio advertising. The stronger these cross-platform network effects, the more appropriate it will be to analyze the multi-sided platform business as a single market. Much will depend on the particular claim being advanced, for in many cases the market may be multi-sided but the claim will implicate just one side.<sup>43</sup>

The Section recommends that the FTC analyze how to determine whether a platform market is likely to have substantial indirect network effects, as the majority in *Amex* found that to be the critical element in determining whether a practice needs to be evaluated across all parts of the platform, rather than one side of the platform.

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<sup>42</sup> See, e.g., Daniel Belanche et al., *Understanding Interactive Online Advertising: Congruence and Product Involvement in Highly and Lowly Arousing, Skippable Video Ads*, 37 J. INTERACTIVE MKTG. 75, 76 (2017) (“live, interactive, audiovisual formats also help increase users’ interest in and acceptance of online ads”); Stuart Dredge, *MySpace – what went wrong: ‘The site was a massive spaghetti-ball mess’*, THE GUARDIAN (Mar. 6, 2015), <https://www.theguardian.com/technology/2015/mar/06/myspace-what-went-wrong-sean-percival-spotify>; Kevin Kelleher, *How Facebook learned from MySpace’s mistakes*, FORTUNE (Nov. 19, 2010), <http://fortune.com/2010/11/19/how-facebook-learned-from-myspaces-mistakes/>.

<sup>43</sup> See, e.g., *United States v. Visa USA*, 344 F.3d 229 (2d Cir. 2003) (claim that Visa and MasterCard were preventing banks from getting network services from Discover and Amex involved only one market, the market for credit card network services); Verified Complaint, *United States v. First Data Corp.*, No. 03-02169 (D.D.C. filed Oct 23, 2003) (claim that merger of providers of PIN debit networks involved only one market, the market for PIN debit network services), <http://www.usdoj.gov/atr/cases/first0.htm>.

In addition, the FTC should consider how traditional economic tools should be modified where the analysis of more than one market is required. Some economists have argued that traditional tools should account for the different sides of multi-sided markets. For example, in markets in which different groups purchase services from both sides of the market in fixed proportions, traditional tools, such as the SSNIP test, critical loss test, and Lerner market power analysis, could be based on a composite price, which incorporates the prices on both sides of the market.<sup>44</sup> In transactional markets, e.g., Airbnb or credit cards, where one buyer is matched with one seller for a given transaction (i.e., there are fixed proportions), should the analysis be different than in non-transactional markets, such as newspapers, where there might be separate but interrelated markets for printed content (readers) and advertising, and the network externality may be positive for only one side of the market?

The FTC should also consider whether standard tests of market definition should be modified when firms set a zero price on one side of a market, and how changes to non-price factors, e.g., degradation of product quality, should be analyzed.

In addition, the FTC should consider the unique issues platforms raise with respect to market entry. It is possible for a positive feedback loop to tip a multi-sided platform into a dominant position. For example, a marketplace that attracts an engaged and growing consumer base will attract additional sellers that will in turn attract more consumers. This can result in the minimal viable scale of a firm being large compared to the firms competing in single-sided markets that do not need to attract customers on both sides of the market at the same time. However, it should not be

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<sup>44</sup> This was the approach of Douglas Bernheim, the defendant's economist in the *Amex* case.

presumed that a platform’s market position is durable, or that a large and growing platform will prevent competing platforms from entering. The growth of Facebook over MySpace provides a well-known example. In that context, the network effects facilitated entry, allowing Facebook quickly to achieve a strong market position.

Finally, the Section recognizes the importance of State experimentation with differing laws. Nevertheless, the Section encourages the Commission to continue to examine state laws that add unnecessary new barriers to entry to platform and sharing companies like Uber or AirBnB,<sup>45</sup> and to work with the States to allow freer entry subject to any overriding local concerns.

**Topic 4: The intersection of privacy, big data, and competition.**

**A. Big data.**

“Big data”<sup>46</sup> is an increasingly significant feature of the modern economy, and the aggregation and use of data can have important implications for competition. There is no shortage of data. Almost every click or swipe on an Internet-enabled device generates “data.” When consumers engage digitally – whether by shopping, visiting websites, paying bills, connecting with

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<sup>45</sup> U.S. FED. TRADE COMM’N, THE “SHARING” ECONOMY (Nov. 2016), <https://www.ftc.gov/news-events/press-releases/2016/11/ftc-sharing-economy-report-explores-evolving-Internet-app-based>. The Commission’s sharing economy report and various letters to state legislators and regulators raising concerns about unnecessary regulation, are relevant in this respect. See Fed. Trade Comm’n, *Selected Advocacy Relating to Occupational Licensing*, FTC.GOV, <https://www.ftc.gov/policy/advocacy/economic-liberty/selected-advocacy-relating-occupational-licensing> (last visited Aug. 1, 2018) (see taxi apps example). We note that the FTC’s expertise in both competition and consumer protection makes the agency particularly well-suited to comment on local regulations purportedly designed to protect consumers but that increase entry barriers for firms using a sharing economy business model.

<sup>46</sup> “Big data is data that contains greater variety arriving in increasing volumes and with ever-higher velocity. . . . Put simply, big data is larger, more complex data sets, especially from new data sources. These data sets are so voluminous that traditional data processing software just can’t manage them.” *The Definition of Big Data*, ORACLE, <https://www.oracle.com/big-data/guide/what-is-big-data.html> (last visited Aug. 1, 2018).

family and friends through social media, using mobile applications, or using connected devices such as fitness trackers or smart televisions – companies collect information about their choices, experiences, and individual characteristics. And with over 3.8 billion Internet users worldwide, data is generated at lightning speeds; it is estimated that we create 2.5 quintillion bytes of data each day.<sup>47</sup>

Nor is there any doubt that data is an asset that can be harvested and sold. But the question for competition analysis is whether data is a *monopolizable* asset – an asset over which the exercise of market power is possible. The answer to that question is much less clear and worthy of Commission study. Generally, data can easily be replicated, and not so easily controlled. Personal information provided to Facebook can easily be provided to Amazon, Twitter, and others. Only the consumer’s behavior on the individual platform is proprietary. In the markets in which data are sold, buyers have plenty of alternatives – subject of course to privacy regulations. And because a given consumer’s data on one platform can be replicated in significant part on other platforms, some have questioned whether any platform could restrict market supply – suggesting the difficulty in achieving any material market power.<sup>48</sup>

Businesses use data to help shape their practices; particularly, they use data to predict the preferences of specific individuals, help tailor services, and guide individualized marketing of

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<sup>47</sup> *Data Never Sleeps 5.0*, DOMO.COM (2017), [https://web-assets.domo.com/blog/wp-content/uploads/2017/07/17\\_domo\\_data-never-sleeps-5-01.png](https://web-assets.domo.com/blog/wp-content/uploads/2017/07/17_domo_data-never-sleeps-5-01.png).

<sup>48</sup> Certain commentators have noted that, because data tends to be “non-rivalrous” (that is, collectable by multiple businesses using similar means), inexpensive to collect, and subject to becoming outdated or stale very quickly, it would be difficult for businesses to try to anti-competitively increase their market power through the use of big data alone. *See, e.g.,* Darren S. Tucker & Hill B. Wellford, *Big Mistakes Regarding Big Data*, ANTITRUST SOURCE (Dec. 2014).

products and services. While businesses have been utilizing consumer data for decades, the quantity, depth, and breadth of consumer data now available to companies is a much more recent phenomenon. The sale of “big data” has become big business. This year alone, the market for big data is estimated to generate \$42 billion worldwide, up from \$35 billion in 2017.<sup>49</sup> And the markets for “big data” are likely to continue to grow as companies start to understand how to best utilize that data. According to a recent survey of Fortune 1000 companies, it has only been within the last year that most companies started seeing measurable results from their big data investments, with over 80% of executives characterizing the investment in big data as “successful.”<sup>50</sup> As the uses of data continue to evolve, and as our society and business become even more data-driven, access to data will become increasingly important. The role that big data plays in our economy is growing and consistently evolving. While the current antitrust and competition laws provide the Commission with dynamic tools with which to analyze the use and sale of data, it is important that the Commission remain engaged in this sector.

**B. The true cost of “free” products and services provided in today’s digital economy and their implications for antitrust enforcement.**

As discussed above, the new digital economy has rejuvenated the use of multi-sided platforms allowing individuals and companies to participate in the economy in new and surprising ways, with implications for antitrust analysis that should trigger empirical research and debate. For example, unlike in a traditional economy where a company may seek cash, credit, and other

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<sup>49</sup> Louis Columbus, *10 Charts that Will Change Your Perspective of Big Data’s Growth*, FORBES (May 23, 2018), <https://www.forbes.com/sites/louiscolombus/2018/05/23/10-charts-that-will-change-your-perspective-of-big-datas-growth/#59c2437d2926>.

<sup>50</sup> Randy Bean, *How Companies Say They’re Using Big Data*, HARVARD BUSINESS REVIEW (Apr. 28, 2017), <https://hbr.org/2017/04/how-companies-say-theyre-using-big-data>.

traditional forms of payment in exchange for a service provided to a consumer, a company operating a multi-sided platform may seek to “monetize” their platform services through alternative means. These may include providing “free” products and services to one side of the platform while receiving payments from another side of the platform (such as obtaining payments from advertisers in exchange for allowing them to show their ads in the course of the company providing “free” television content to viewers), or obtaining alternative forms of “payment” in exchange for services provided (such as users’ personal information that the platform company may seek to monetize through other means, such as selling that data to other companies). These departures from traditional monetization models may require antitrust policymakers to rethink when a platform operator, for example, can be said to have priced “below cost” for the purposes of determining whether the operator is engaged in illegal predatory pricing.

Furthermore, many platforms depend on leveraging “network effects” (achieving greater value by increasing their user base) to succeed in the market. These newer monetization models may increase the value of the platform by lowering the cost of entry for users and attracting a greater user base, and may, therefore, potentially promote greater competition across platforms by making the platform attractive to more users. However, if the platform has reached a “tipping point” enabling it to become the dominant platform in the market and the model anticompetitively prevents competitors from introducing alternative platforms to challenge that dominance, the model may (or may not) raise competitive concerns.

The Section encourages the Commission to examine these new monetization models, including an examination of the real price for nominally “free” products and services in light of these

models, to determine how these models may or may not lead to potential exclusionary concerns under antitrust law.

**C. Competition, consumer protection, and data privacy regulation.**

The role of data in the new digital economy has given rise to many other concerns about their use and misuse, especially regarding how personal data is collected, utilized, stored, and processed. Section 5 of the FTC Act provides the Commission the authority to investigate and prevent abuses of personal data as either an issue of antitrust (under its authority to investigate “unfair methods of competition”) or consumer protection and substantive data privacy regulation (under its authority to investigate “unfair and deceptive acts or practices”).

It is important, however, for the Commission to identify as early as possible the precise nature of the harm arising from alleged abuse of personal data, as that will inform which of these authorities the Commission will invoke and which resources and analytical tools will be best suited to resolve the issue. For example, certain abuses of personal data could potentially (if improbably) raise antitrust concerns if they increase the market power of the data controller and threaten to exclude rivals through anticompetitive means. The overwhelming majority of concerns regarding the use of data, however, may be more appropriately framed as concerns for consumer protection and substantive data privacy regulation. In such situations, the concern is more greatly focused on balancing businesses’ commercial uses of data collected from consumers and the rights of consumers over their own data, and may not even involve any threat of excluding rivals in the market in which the data controller participates. This balance of interests will generally require an enforcer to take substantive positions regarding values such as anonymity, data security, and empirical matters such as the state of cybersecurity technology, for which antitrust provides no answers or means of analysis. The analytical framework created under the Commission’s “unfair

and deceptive acts and practices” authority provides the tools for the Commission to engage in such a balancing act, and has resulted in a growing body of case law and administrative guidance by the Commission allowing it to strike the right balance between the interests of businesses and consumers.

Furthermore, despite the increasingly global nature of “big data,” its regulation is still very jurisdiction specific. Even within the United States, regulation of data security and consumer privacy differs from state to state. In 2015 alone, approximately 60 new privacy laws were passed at the state level. This creates a regulatory challenge for companies operating in multiple jurisdictions (which is virtually every company with a digital presence) that can increase costs and create uncertainty. Conflicts in regulatory schemes can be especially challenging for small businesses. And that does not include the various regulatory regimes that are triggered when data is transferred outside of the United States (or into the United States from another country).

Earlier this year, the General Data Protection Regulation (“GDPR”) went into effect in the European Union, where it is now the standard in all 28 member-states. GDPR provides greater protection for personal data, which could present a challenge for companies that currently abide by only U.S. regulations. Currently, there is a mechanism in place that allows for the flow of data from Europe to the United States, if certain conditions are met – the Privacy Shield. The Privacy Shield is an agreement reached between the United States and European Union in 2016 that replaced the previous data-sharing agreement known as the Safe Harbor. But this new agreement is being challenged. The European Court of Justice is currently reviewing whether the Privacy Shield provides adequate protection for personal data of Europeans. If the Court finds that the U.S. lacks sufficient safeguards against government access to this personal data, it may become illegal to send



personal data from the European Union to the U.S., which may create a competitive disadvantage for U.S. companies both at home and abroad.

The Section encourages the Commission to explore the role that privacy should play in antitrust, including an examination of the challenges of weighing decreases in privacy against beneficial uses of consumer data. The Commission should also consider when concerns regarding privacy may raise concerns of anticompetitive exclusion to be investigated as an “unfair method of competition,” versus concerns of consumer protection and substantive data privacy regulation better investigated as an “unfair or deceptive act or practice” under Section 5 of the FTC Act or the various other statutes the Commission enforces. Finally, as discussed more fully below under Topic 5, the Commission should fully assess the drawbacks and benefits of the varying regulatory approaches, with the objective of promoting standards that simultaneously protect consumers and promote competition.

**Topic 5: The Commission’s remedial authority to deter unfair and deceptive conduct in privacy and data security matters.**

**A. Third-party audits.**

The Section is aware that critics of the FTC’s privacy and data security settlements take issue with the agency’s requirement that target companies establish comprehensive privacy programs reasonably designed to address risks, coupled with periodic independent third-party assessments and reports. Such critics claim that the companies’ programs may be circular, that the assessments do not rise to the level of audits, and that greater transparency in oversight is warranted.

The Section believes that this criticism is unwarranted, and indeed, that certain of the suggested remedial measures would harm consumers, the companies that are the subject of the FTC’s orders, and competition. Companies that are subject to the FTC’s privacy orders routinely

expend significant resources, time, and attention to achieve compliance and, as a result, often implement privacy controls that go beyond what the FTC's orders require in the first instance. It is important, however, that companies be able to implement these compliance measures – *e.g.*, the testing of controls, vulnerabilities, and feedback – and to report them back to the FTC Division of Enforcement in a confidential manner, without threat that such genuinely confidential information will be revealed to the public. Indeed, in many cases, releasing this sensitive and proprietary information could provide a roadmap for evasive tactics to the same nefarious actors the Commission seeks to impede with its orders. Moreover, this suggestion runs counter to practice in other areas. Every FTC consumer protection administrative order, and many of the FTC's federal court orders, require the respondent or defendant to submit a compliance report to the FTC. While these reports are considered to be a part of the public record, they typically are not made available either in redacted or whole form.<sup>51</sup>

**B. The Commission should consider more clearly articulating security practices that it considers unreasonable.**

The Section recommends that the Commission consider taking a second look at its approach to data security enforcement remedies in light of the Eleventh Circuit's decision in *LabMD, Inc. v. FTC*.<sup>52</sup> This ruling also calls on the Commission to redouble its efforts to offer clear notice of what constitutes commercially reasonable data security measures.

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<sup>51</sup> The FTC's Rules of Practice permit submitters to request confidential treatment, in whole or in part, of compliance reports. *See* 16 C.F.R. §§ 4.9(b)(7) and (c). In other instances where the FTC publishes corporate submissions, they often are posted in redacted form. *See, e.g., COPPA Safe Harbor Program*, U.S. FED. TRADE COMM'N, <https://www.ftc.gov/safe-harbor-program> (last visited at July 31, 2018).

<sup>52</sup> No. 16-16270, 2018 WL 3056794 (11th Cir. June 6, 2018).

In *LabMD*, the Eleventh Circuit reaffirmed that FTC orders, no less than district court injunctions, are unenforceable if not “reasonabl[y] definite[.]”<sup>53</sup> and “stated with clarity and precision.”<sup>54</sup> Applying this standard, the court vacated a cease and desist order requiring LabMD to establish, implement, and maintain a “comprehensive information security program” that is “reasonably designed” to protect the security of consumers’ personal information through “administrative, technical, and physical safeguards appropriate to respondent’s size and complexity, the nature and scope of respondent’s activities, and the sensitivity of the personal information collected from or about consumers.”<sup>55</sup> The court held this provision unenforceable because it imposed an “indeterminable standard of reasonableness” and was “devoid of any meaningful standard” informing a court in any enforcement action as to “what constitutes a ‘reasonably designed’ data security program.”<sup>56</sup>

The *LabMD* ruling raises questions about the enforceability of a majority of the Commission’s more than 60 data security consent orders that contain nearly identical comprehensive security program requirements.<sup>57</sup> To date, the FTC has not prohibited or required specific conduct, *e.g.*, “use X type of encryption,” “do not use Y type of firewall,” or specifying the types of security processes that a company should implement. The challenge is that very specific order provisions

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<sup>53</sup> *Id.* at \*10.

<sup>54</sup> *Id.* See also, *e.g.*, *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965) (“[T]his Court has also warned that an order’s prohibitions ‘should be clear and precise in order that they may be understood by those against whom they are directed’ . . . .”) (citation omitted).

<sup>55</sup> Final Order at 2, *LabMD*, Docket No. 9357 (F.T.C. Jul. 28, 2016).

<sup>56</sup> 2018 WL 3056794, at \*11.

<sup>57</sup> The Commission first imposed such a provision in 2005, see *BJ’s Wholesale Club, Inc.*, 140 F.T.C. 465 (2005), and has included them in the overwhelming majority of data security consent orders since then.

could become obsolete over time because technology is, by its nature, dynamic and evolving. Specific challenges could also be misinterpreted to argue against the FTC's ability to seek enforcement through consent orders. Accepting the validity of those concerns, the Commission might explore more targeted orders that focus on the specific conduct or category of conduct that caused or was likely to cause consumer injury, or that articulate the specific results required (as opposed to the means to achieve them).

The *LabMD* decision also should lead the Commission to consider the manner in which it communicates its views to industry about what constitutes commercially reasonable data security practices. The FTC has made significant efforts to provide more data security guidance in recent years through the *Start with Security* guide and the *Stick with Security* blog posts. Nevertheless, it should consider whether additional business guidance, an enforcement policy statement, or some other tool can be used to elucidate what data security practices are reasonable.

**C. The Commission should take an active role in efforts to promote harmonization of federal and state data privacy and security laws.**

The FTC has long played a pivotal role in U.S. privacy law. Through policy initiatives and enforcement – including joint enforcement with the states – the FTC provides guidance based on law enforcement actions that is consistent, appropriately protects consumers, and provides flexibility in the midst of rapid, large-scale innovations in the data-driven economy.

The FTC privacy framework focuses on the sensitivity of consumer data and companies' promises about data collection and use, rather than on what type of entity collects or uses that data. Again acknowledging the importance of allowing state legislative experimentation, the Section believes in this context that consumers and businesses deserve a consistent standard of online privacy protection that applies to all entities collecting personal data online. A national privacy

framework will ensure that privacy protections are applied uniformly, which provides certainty to both consumers and businesses operating online. A patchwork of differing state privacy rules is confusing and difficult to implement, and it undercuts the benefit of consistency in the treatment of consumers' personal information regardless of who is collecting the information.<sup>58</sup>

One example of a state law that could alter the regulatory landscape with respect to privacy dramatically is the California Consumer Privacy Act ("CCPA"). In addition to creating several new consumer privacy rights for California consumers and obligations on businesses operating in California across a broad range of personal information, the CCPA provides regulatory and enforcement tools that are without analogue under state and federal law. Specifically, the CCPA authorizes the California Attorney General to issue regulations "as necessary to further the purposes" of the law and directs the Attorney General to initiate rulemaking proceedings before the effective date.<sup>59</sup> In essence, the CCPA creates a new data protection authority at the state level with the power to shape, and re-shape, consumer privacy law for many thousands of businesses and millions of consumers.

The CCPA also authorizes the California Attorney General and private plaintiffs to seek statutory damages for violations of the new law. The private right of action is limited to certain data security breaches, but the Attorney General may seek statutory damages (and other relief) for any

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<sup>58</sup> Although the Section favors national uniformity for the reasons given above, the Section also recognizes the contrary view that state by state experimentation is a valuable goal. Some members of the Section are of the view that having differing state laws as "incubators" is more important than national uniformity.

<sup>59</sup> See California Consumer Privacy Act of 2018, CAL. CIV. CODE § 1798.185(b) (adding Civil Code § 1798.185, which provides the California Attorney General's rulemaking authority).

violation of the CCPA. Given the harm to consumers that privacy breaches may cause, and the difficulty of detection, enhancing enforcement seems sound.

Both developments warrant the FTC's close attention and, as appropriate, advocacy. The FTC's upcoming public hearings present a valuable opportunity for the FTC to better understand how more heavily regulatory privacy regimes in California affect companies' practices throughout the United States. The FTC's hearings come at a good time because other states – and, perhaps, a future Congress – may be looking to California as a model for their own legislation. The FTC hearings provide the opportunity to explore the drawbacks and benefits of regulatory approaches that could shape privacy policy and legislation in a thoughtful manner, rather than allowing one model to prevail simply because it is the first one on the books.

In addition, the FTC could use information gathered through the hearings to inform its decisions about whether or how to engage in advocacy in California. For example, personnel with relevant expertise, including the Office of Policy Planning and Bureau of Consumer Protection, could develop comments in regulatory proceedings led by the California Attorney General and respond to requests for views on any CCPA amendments that are considered.<sup>60</sup> The Commission and its staff routinely engage in these forms of advocacy at the state and federal levels on a wide range of issues (albeit rarely on privacy matters), and playing a similar role in California could be a productive way to use the FTC's privacy expertise and leadership regarding CCPA issues.

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<sup>60</sup> In response to requests from state officials, FTC staff frequently provide comments on state legislative initiatives. Most recently, see U.S. FED. TRADE COMM'N, FTC STAFF COMMENT TO WASHINGTON STATE REP. PAUL GRAVES, REGARDING S.S.B. 5411/H.B. 1473 (Feb. 9, 2018), <https://www.ftc.gov/policy/advocacy/advocacy-filings/2018/02/ftc-staff-comment-washington-state-rep-paul-graves>; see also *Advocacy Filings*, U.S. FED. TRADE COMM'N, <https://www.ftc.gov/policy/advocacy/advocacy-filings> (listing comment on state regulatory and legislative issues).

**D. The Commission should conduct more rigorous analyses of materiality in deception cases to quantitatively measure consumer injury.**

The FTC has used its Section 5 authority to bring privacy and data security actions. One of the elements of an unfairness action is the likelihood of substantial consumer injury. While injury is not an element of a deception action *per se*, to be actionable, deception claims must be material. The FTC's Policy Statement on Deception provides that express claims are presumptively material.<sup>61</sup>

To quantitatively measure consumer injury, particularly in the context of consumer choice, the Commission should conduct more rigorous analyses of materiality in deception cases. In particular, the Commission should more closely examine whether express and implied claims relating to privacy actually influence consumer behavior when determining whether to bring enforcement actions. The Bureau of Economics is well-positioned to conduct this kind of inquiry. Although the Deception Policy Statement treats express and intended implied claims as presumptively material, it also addresses circumstances in which that presumption may be overcome. The Commission, however, has not closely examined how that presumption should be applied in enforcement actions involving privacy representations.

As former FTC Commissioner Wright indicated in his 2015 dissent from the proposed settlement in *Nomi Technologies, Inc.*, simply relying on a presumption of materiality for all express privacy statements without analysis of whether such statements are material in fact can be “an approach that places legal form over substance, is inconsistent with the available data, and defies

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<sup>61</sup> FTC Policy Statement on Deception, Letter from James C. Miller III, Chairman, Federal Trade Commission, to Representative John D. Dingell, Chairman, House Committee on Energy and Commerce (Oct. 14, 1983), *appended to* *Cliffdale Assocs., Inc.*, 103 F.T.C. 174 (1984).

common sense.”<sup>62</sup> Furthermore, as conveyed in the many public comments filed in response to the Commission’s proposed consent order with Nomi and in Commissioner Ohlhausen’s dissenting statement in response to the Commission’s vote to finalize the settlement, FTC enforcement actions for *de minimis* privacy violations “may, ironically, undermine the FTC’s own established privacy goals.” Specifically, where the FTC brings enforcement actions against express statements that may be technically misleading in some respect but are not supported by evidence of materiality, such actions “diminish companies’ incentives to be transparent about their privacy practices” and “discourage companies from offering privacy choices to consumers.”<sup>63</sup>

An examination of the presence of materiality, rather than a reliance on presumptions, without more, provides a useful means for conducting quantitative measurements of consumer injuries because the Commission’s enforcement of deception claims already uses materiality as a proxy for consumer injury. According to the Deception Policy Statement, the purpose of the materiality element is to limit deception actions to claims that are important to consumers, and in particular, to misrepresentations or practices “likely to affect a consumer’s choice of or conduct regarding a product.” In other words, a misleading claim causes harm only when it influences consumer behavior. Thus, by engaging in a quantitative measurement of whether consumer behavior was actually influenced by a misleading claim, rather than merely relying on a presumption that a claim is material, the Commission can more effectively prioritize enforcement actions against

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<sup>62</sup> Joshua D. Wright, Comm’r, U.S. Fed. Trade Comm’n, Dissenting Statement, Nomi Technologies, Inc., FTC File No. 132-3251, at 4 (F.T.C. Apr. 23, 2015), [https://www.ftc.gov/system/files/documents/public\\_statements/638371/150423nomiwrightstatement.pdf](https://www.ftc.gov/system/files/documents/public_statements/638371/150423nomiwrightstatement.pdf).

<sup>63</sup> Maureen K. Ohlhausen, Comm’r, U.S. Fed. Trade Comm’n, Dissenting Statement, Nomi Technologies, Inc., FTC File No. 132-3251, at 1-2 (F.T.C. Aug. 28, 2015), [https://www.ftc.gov/system/files/documents/public\\_statements/799571/150828nomitechmkostatement.pdf](https://www.ftc.gov/system/files/documents/public_statements/799571/150828nomitechmkostatement.pdf).



those claims that involve concrete consumer injury. In furtherance of this objective, the Section recommends that the Commission expand on the knowledge gained through its workshop on informational injury and provide guidance on how it intends to evaluate materiality and issues like concealment and the inability to detect in future privacy enforcement.

**Topic 6: Evaluating the competitive effects of corporate acquisitions and mergers.**

**A. Market definition in technology market.**

As noted under Topic 2, in light of recently litigated cases and commentary regarding rapidly evolving “platform” markets, the Section encourages the FTC to consider how market definition should best be addressed in mergers and acquisitions involving rapidly developing technology industries, particularly evolving industries in which parties compete on non-price factors and multi-sided platform industries. For example, under what circumstances is defining a relevant market necessary and what types of direct evidence could inform, curtail, or even eliminate the need for an analysis of market definition as a precursor to evaluating the competitive effects of a proposed transaction.<sup>64</sup>

**1. Rapidly evolving technology markets.**

Predicting the competitive pressure that a newly introduced technology will place on legacy technology in the future can be difficult. One of the complications is the assessment of the extent to which legacy technology that is somewhat differentiated from the merging parties’ technology offers effective competition. Moreover, there can be challenges in assessing the impact of disruptive or

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<sup>64</sup> The FTC should relatedly consider how, if establishing an appropriate market definition were not a prerequisite to challenging a merger or acquisition, such a position can be reconciled with the clear mandate in Section 7 of the Clayton Act that only mergers and acquisitions that may lessen competition substantially in a “line of commerce” and in a “section of the country” are unlawful.

generational changes in technology—both of which are important to a thorough and accurate competitive effects analysis. The FTC hearings would benefit from a discussion of the issues raised by recent mergers in these types of markets, focusing on how the relevant product market should be defined in dynamic markets.

In *United States v. Bazaarvoice*,<sup>65</sup> which involved the merger of two online ratings and reviews platform (“R&R platform”) providers, Bazaarvoice argued, among other things, that Amazon was lurking on the edge of the R&R market and already involved in online commerce, reviews, and online social interactions. In ultimately rejecting this argument, Judge Orrick conducted a highly fact intensive inquiry that focused on historical entry patterns and minimized the competitive significance of emerging solutions by high-tech firms as “too weak or merely complementary,” and therefore implicitly accepted the DOJ’s market definition of R&R platforms.<sup>66</sup> Given the court’s effort to grapple with the issue in *Bazaarvoice*, and the parties’ arguments, the FTC should consider whether evidence of dynamic changes in technology could, or should, affect the drawing of market definition boundaries.

## **2. Non-price competition.**

In a number of markets, including many digital markets, price is not always the main, or only, dimension of competition between products. In platform contexts, this can be seen by companies offering free services to consumers while charging advertisers. Scholars have noted how

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<sup>65</sup> *United States v. Bazaarvoice*, No. 13-cv-00133-WHO, slip op. at 8 (N.D. Cal. Jan. 8, 2014).

<sup>66</sup> *Id.* at 75-76.

firms can compete for the attention of consumers using non-price mechanisms, such as quality.<sup>67</sup> A framework for analyzing combinations between firms that may implicate concerns about non-price competition should be carefully considered by the FTC, as well as how the hypothetical monopolist test might be transposed into this non-price digital context. Although economic analysis of the issue is still evolving, there are proposals that deserve discussion and the FTC's consideration. In particular, as discussed above, the FTC should consider whether it makes sense, in this analytical context, to move away from a traditional SSNIP test in some contexts towards an analytical approach that focuses on non-price measures of consumer benefits (e.g., measuring time spent online rather than price to measure value in an attention market).<sup>68</sup>

### **3. Multi-sided markets.**

See discussion under Topic 2.

## **B. Vertical merger policy.**

### **1. Modern foreclosure analysis.**

Following the district court's decision in *United States v. AT&T*,<sup>69</sup> the Section recommends that the FTC analyze the current status of vertical merger enforcement. In particular, the Section impresses upon the FTC the importance of studying and reporting on the extent to which benefits of

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<sup>67</sup> See, e.g., Tim Wu, *Blind Spot: The Attention Economy and the Law*, 82 ANTITRUST L.J. (forthcoming 2018).

<sup>68</sup> *Id.* For an alternative analysis, see, e.g., David S. Evans, *Attention to Rivalry among Online Platforms and Its Implications for Antitrust Analysis* 3 (Coase-Sandor Institute for Law & Economics Working Paper No. 627, 2013) ("Analyzing attention, which is the dimension on which these rivals compete in fact, reduces the likelihood of [type I and type II] errors. The precise contours of markets, market power, and impacts on competition will depend on the particular circumstances of the subjects of the antitrust analysis, the conduct under consideration, and the extent of differentiation among relevant attention rivals.").

<sup>69</sup> No. 17-2511, 2018 U.S. Dist. LEXIS 100023 (D.D.C. June 12, 2018).

vertical integration have been achieved, whether and under what circumstances vertical integration creates additional opportunities for holdup, the proper role of bargaining theory in evaluating vertical integration, and, critically, the types of remedies the Commission will consider.

It has long been understood that by combining businesses operating at separate levels of the production process, vertical mergers can intensify interbrand competition. For example, vertical integration may facilitate more efficient coordination with respect to design, production, promotion, or R&D, and it can eliminate double marginalization. Several recent merger cases highlight how these efficiencies are particularly applicable to the vertical merger context. First, in the *AT&T* decision, the court credited executives' testimonies that combining AT&T's wireless network and viewer data with Time Warner's content and advertising inventory would, among other efficiencies, enable the merged entity to distribute videos over mobile devices and better tailor advertisements. Those assets are "worth far more" together than alone and would allow the merged entity to "transform" the way video content is distributed.<sup>70</sup> Second, Bayer's acquisition of Monsanto offered to combine seed and trait development with crop protection, biologics, and digital farming products to spur agricultural innovation.<sup>71</sup> Such efficiencies translate into consumer benefits by way of lower prices, higher quality, and/or increased innovation.

On the other hand, the Section recognizes the continued need to consider the potential risk of foreclosure in vertical mergers. Where one party supplies to or purchases from a competitor of the other, there is a risk that a vertical merger will create incentives to discriminate against rivals,

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<sup>70</sup> *Id.* at \*16-17.

<sup>71</sup> Press Release, Bayer Offers to Acquire Monsanto to Create a Global Leader in Agriculture (May 23, 2016), <https://media.bayer.com/baynews/baynews.nsf/id/Bayer-Offers-to-Acquire-Monsanto-to-Create-a-Global-Leader-in-Agriculture>.

foreclosing access to inputs or customers that were previously available at lower costs or on better terms. For example, a merged media content provider and distributor may close off its system by keeping content exclusive to the integrated company,<sup>72</sup> preventing rivals' ability to access the integrated company's network or products<sup>73</sup>; it might also facilitate coordination among competitors.<sup>74</sup> Foreclosure may allow the merged firm to raise the market price or otherwise harm consumers.

In *United States v. AT&T*, the Department of Justice Antitrust Division ("Division") applied an increased bargaining leverage theory of harm to vertical mergers. Bargaining theory predicts that parties will cooperate if the payoff from doing so exceeds the value of not cooperating.<sup>75</sup> Each party's downside position (or standalone value) is called its "threat value."<sup>76</sup> For example, the Division alleged that pre-merger, Turner's failure to strike a deal with a video-programming distributor would result in a "blackout" period during which Turner would lose the rights to display its content to the distributor's customers.<sup>77</sup> That would also cause Turner to lose affiliate fees and

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<sup>72</sup> See, e.g., *United States v. Charter Communications*, 81 Fed. Reg. 30550 (May 17, 2016) (prohibiting acts that would limit an online distributor's access to content); *United States v. Comcast Corp.*, No. 11-106 (RJL), 2013 U.S. Dist. LEXIS 132001 (D.D.C. Aug. 21, 2013) (prohibiting acts that would limit an online distributor's access to content).

<sup>73</sup> See, e.g., *America Online, Inc.*, 131 F.T.C. 832 (2001) (opening the merged entity's cable system to competing Internet service providers); *United States v. Google Inc.*, 76 Fed. Reg. 21017 (Apr. 14, 2011) (imposing licensing requirements to address concern that merged entity will deny competing online travel intermediaries' access to forthcoming back-end technology).

<sup>74</sup> See, e.g., *Broadcom Limited*, 82 Fed. Reg. 32186 (July 12, 2017) (requiring that the merged entity install firewalls to address concerns that Broadcom's access to the confidential business information of Brocade's competitor, Cisco, could facilitate coordinated interactions).

<sup>75</sup> See ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 74-76 (6th ed. 2016).

<sup>76</sup> *Id.* at 75.

<sup>77</sup> *United States v. AT&T*, No. 17-2511, 2018 U.S. Dist. LEXIS 10002 at \*30-31 (D.D.C. June 12, 2018).

advertising revenues. By comparison, the distributor may lose current and future subscribers. Post-merger, however, and because AT&T competes with other distributors, a blackout may divert the distributor's customers to AT&T. Therefore, the merger would improve Turner's threat value and shift bargaining leverage in Turner's favor. According to the Division, such a shift would enable Turner to demand higher prices for its content post-merger, which may in turn be passed on by the distributor to viewers in the form of higher subscription fees. While not deciding the legal sufficiency of the Division's allegations, the district court found that the evidence offered at trial was factually insufficient to show that Turner will gain increased leverage.<sup>78</sup>

The economics literature relating to vertical mergers has grown in recent years and there are new judicial precedents, including *AT&T*, which employ analytical approaches not addressed in the DOJ's Non-Horizontal Merger Guidelines. Those Guidelines, last updated in 1984, were never adopted by the FTC. The Section believes that the FTC should review its vertical merger policies and provide guidance to businesses considering vertical mergers so that they can better understand when vertical mergers may be challenged and why.

## **2. Remedies.**

Recent policy discussions of vertical mergers have focused on what remedial actions are appropriate when a vertical merger raises competitive issues. In a speech given at last year's ABA Fall Forum, Assistant Attorney General Makan Delrahim expressed a strong preference against behavioral remedies, which have often been viewed as the default remedy for addressing the exclusionary harm vertical mergers may pose. AAG Delrahim argued that a behavioral remedy

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<sup>78</sup> *Id.* at \*30.

“supplants competition with regulation” in a way that interferes with the market as a price system for communicating disaggregated information.<sup>79</sup> In so doing, the DOJ expressed its view of its role as law enforcement rather than regulation.

FTC officials have also expressed a preference for structural relief. In a recent speech, Bureau of Competition Director Bruce Hoffman stated that “no one should be surprised if the FTC requires structural relief” in a vertical merger case.<sup>80</sup> In light of these statements and the continuing use of both structural and behavioral remedies, the antitrust and business communities could benefit substantially from more comprehensive guidance of the Commission’s views concerning the circumstances when structural remedies may be necessary to remedy harm from vertical mergers. Importantly, the FTC should consider evaluating these issues in the context of the findings of its Merger Remedies study, which concluded that its remedies addressing vertical mergers were successful, notwithstanding the lack of any structural remedy.<sup>81</sup> The Section is unaware of any contrary findings.

### **C. Other Issues.**

#### **1. Analytical tools used to evaluate mergers and acquisitions.**

The Section encourages the Commission to examine the analytical tools it uses in merger review to ensure that its techniques are as effective as possible and to alert the public as to the specific analytical tools that it is employing. In particular, the Commission should consider using

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<sup>79</sup> Makan Delrahim, Assistant Attorney General, U.S. Dep’t of Justice Antitrust Division, Address at the American Bar Association’s Antitrust Fall Forum (Nov. 16, 2017).

<sup>80</sup> Bruce Hoffman, Director, Bureau of Competition, U.S. Fed. Trade Comm’n, Remarks at Credit Suisse 2018 Washington Perspectives Conference (Jan. 10, 2018).

<sup>81</sup> U.S. FED. TRADE COMM’N, THE FTC’S MERGER REMEDIES 2006-2012 (Jan. 2017).

retrospective analyses of prior cases to test its analytical tools, as well as reviewing developments in the economics literature to identify analytical tools that the FTC views as particularly informative for merger analysis.<sup>82</sup>

Quantitative analysis lies at the heart of modern merger review. Yet successful econometric modeling depends on the selection of the correct tool and an understanding of the model's purpose and limitations. A discussion of the strengths and weaknesses of each analytical approach, including with respect to applicable and realistic data requirements, would be useful.

The Commission should consider developing more explicit guidance explaining when particular approaches will be used. For example, what data limitations may lead to the use of one model rather than another? What is lost when data availability suggests use of an inferior model because the data are not there for better models? What industry characteristics might suggest that one type of model may be more relevant than another in particular cases? Clear communication about these issues will help lead to consistent and fair results, more productive dialogue with merging parties, and more efficient and accurate reviews.

The Commission should also (1) articulate its views on the differences between incentive models, such as UPP calibration, and equilibrium models such as merger simulation, and how any countervailing efficiencies can best be incorporated into these models to assess the net, rather than the gross price effects, and (2) explore and describe circumstances in which models may generate

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<sup>82</sup> For example, for the analysis of vertical mergers, Moresi and Salop proposed vGUPPIs, a tool for evaluating unilateral incentives following a vertical merger. *See* Serge Moresi & Steven C. Salop, *vGUPPI: Scoring Unilateral Pricing Incentives in Vertical Mergers*, 79 ANTITRUST L.J. 185 (2013). Sheu and Taragin's bargaining model simulates the outcome of both horizontal and vertical mergers. *See* Gloria Sheu & Charles Taragin, *Simulating Mergers in a Vertical Supply Chain with Bargaining* (DOJ Antitrust Division Economic Analysis Group Discussion Paper EAG 17-3, Oct. 2017).



different predictions about post-merger pricing and consider what should be done when the incentive and equilibrium models generate conflicting results. Finally, the Commission should offer some guidance on how it views and interprets the results of the UPP measure, after eight years of its use.

## **2. Potential competition in merger reviews.**

The rapid growth and continued evolution of the high-tech sector has reinvigorated public debate regarding whether antitrust enforcers are able to adequately assess (or predict) the potential competitive effects of a proposed merger, particularly where the acquisition involves a firm that could be considered a nascent competitive threat to a leading firm with which it proposes to merge.

While there is a well-established doctrine of potential competition that likely remains both a sufficient and appropriate tool for analyzing the competitive effects of an acquisition of a firm that may be a nascent competitive threat, it would be helpful if the FTC would clarify both the situations where it is likely to be concerned about potential competition effects and the factual evidence that it collects to evaluate these concerns.

Although merger review is generally prospective, theories of potential competition carry significant evidentiary challenges. Particularly in dynamic markets where a new technology has been introduced, predicting the competitive pressure that such new technology will place on legacy technology (and associated products) in the future may be difficult to assess. Indeed, a technology that may not be a close substitute today (for at least certain customer classes) may be a close substitute tomorrow (and may even force the legacy product from the market). As a result, the FTC hearings would benefit from further discussion regarding the issues raised by recent mergers involving an assessment of potential competition, particularly within dynamic markets.

Finally, the Section recommends that the Commission engage in a discussion of the types of evidence that will be necessary to support the conclusion that a party to a merger would, absent the

merger, have been likely to enter the market, expand its presence in the market, or otherwise render the market more competitive.

### **3. Common Ownership.**

The Section also asks the FTC to consider how it can contribute toward a better understanding of the competitive implications of common ownership by large, diversified institutional investors. The prominence of these investors in the American economy has notably increased since the Pitofsky hearings, with a vibrant debate emerging regarding the need for policy changes to address possible anticompetitive effects.<sup>83</sup> While given the nascent stage of the empirical literature,<sup>84</sup> radical policy changes in this area would be premature at this time,<sup>85</sup> the FTC should evaluate whether FTC studies could enrich this ongoing debate consistent with the importance of evidence-based policy reform.

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<sup>83</sup> Compare Eric A. Posner, Fiona Scott Morton, & E. Glen Weyl, *A Proposal to Limit the Anti-Competitive Power of Institutional Investors*, 81 ANTITRUST L.J. 669 (2017), with Edward B. Rock & Daniel L. Rubinfeld, *Antitrust for Institutional Investors* (NYU Law and Economics Research Paper No. 17-23, 2017).

<sup>84</sup> Compare Jose Azar, Martin C. Schmalz, and Isabel Tecu, *Anti-Competitive Effects of Common Ownership*, J. FIN. (forthcoming 2018), with Daniel O'Brien & Keith Waehrer, *The Competitive Effects of Common Ownership: We Know Less Than We Think*, 81 ANTITRUST L.J. 729 (2017).

<sup>85</sup> See OECD DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE, HEARING ON COMMON OWNERSHIP BY INSTITUTIONAL INVESTORS AND ITS IMPACT ON COMPETITION – NOTE BY THE UNITED STATES (Nov. 2017), [https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/common\\_ownership\\_united\\_states.pdf](https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/common_ownership_united_states.pdf).

**Topic 7: Evidence and analysis of monopsony power, including but not limited to, in labor markets.**

**A. Buyer power v. monopsony power.**

Monopsony power is the power to reduce price by restricting market output.<sup>86</sup> Some antitrust commenters have attempted to distinguish “monopsony power” from “buyer power,”<sup>87</sup> where the buyer purchases substantial quantities sufficient to bargain down the price, but without any ability to reduce (or credibly threaten to reduce) total market purchases, and where monopsony power is a cause for antitrust concern while buyer power is not.<sup>88</sup> Others have suggested that there is no distinction between monopsony and buyer power that is relevant to competition policy.<sup>89</sup> The Section encourages the Commission to study the distinction, if any, between monopsony power and buyer power, to report the differences, and to explain whether, how, and why these differences matter to the Commission’s assessment and case selection in monopsony cases.

**B. Impact of downstream considerations on exercise and analysis of monopsony power.**

The Commission should investigate the role of downstream competitive considerations in connection with the exercise of monopsony power. For example, where a buyer engages in

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<sup>86</sup> See, e.g., Jonathan M. Jacobson & Gary J. Dorman, *Joint Purchasing, Monopsony, & Antitrust*, 36 ANTITRUST BULL. 1, 6-9 (1991).

<sup>87</sup> See, e.g., OECD, POLICY ROUNDTABLES, MONOPSONY AND BUYER POWER 9 (2008), <https://www.oecd.org/daf/competition/44445750.pdf>; Jonathan M. Jacobson, *Monopsony 2013: Still Not Truly Symmetric*, ANTITRUST SOURCE, Dec. 2013.

<sup>88</sup> Buyer power can be exercised in any market. Monopsony power, however, can exist only in markets with upward-sloping supply curves at relevant levels of output. Jacobson, *supra* note 87, at 10. If the industry supply curve is flat or downward-sloping, restricting market purchases will leave prices unchanged or drive them higher. Agricultural and labor markets have classically upward-sloping supply curves, and those are the markets most often susceptible to monopsony power.

<sup>89</sup> See, e.g., PETER C. CARSTENSEN, COMPETITION POLICY AND THE CONTROL OF BUYER POWER: A GLOBAL ISSUE 38 (2017).

anticompetitive conduct resulting in less than competitive pricing upstream, does that constitute an independent harm even if there is a negligible or positive (cost-reducing) impact on downstream output or pricing?<sup>90</sup> Does it matter whether the purchaser uses its upstream price reductions to reduce price and increase competition downstream?<sup>91</sup> In what situations would one expect to find a buyer that has upstream monopsony power but not downstream market power?<sup>92</sup> When do downstream considerations have a constraining effect on the exercise of monopsony power? For example, does the desire to win additional sales volume downstream, the need to maintain efficient production scale, or a concern about facilitating new downstream entry through lower input prices prevent a firm with monopsony power from reducing or credibly threatening to reduce its upstream purchases? The Section encourages the Commission to explain the role of downstream considerations on how it analyzes concerns about monopsony power in upstream purchases.

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<sup>90</sup> See C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers* 127 YALE L.J. 2078, 2079 (2018) (arguing that a merger that harms competition for upstream sellers is sufficient to support liability regardless of effects on downstream consumers); see also *The Consumer Welfare Standard in Antitrust: Outdated, or a Harbor in a Sea of Doubt?: Hearing Before the Subcomm. on Antitrust, Consumer Prot. and Consumer Rights of the S. Comm. on the Judiciary*, 115th Cong. 2 (2017) (opening statement of Carl Shapiro, Professor of Business Strategy, University of California, Berkeley), <https://www.judiciary.senate.gov/imo/media/doc/12-13-17%20Shapiro%20Testimony.pdf> (“applying the ‘consumer welfare’ standard means that *a business practice is judged to be anti-competitive if it disrupts the competitive process and harms trading parties on the other side of the market*”).

<sup>91</sup> See, e.g., *United States v. Anthem Inc.*, 855 F.3d 345, 377-78 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (arguing that even if downstream consumers of medical services would benefit from the merger in the form of lower healthcare provider rates, the merger may nonetheless be unlawful if such prices are the result of monopsony power in the upstream market).

<sup>92</sup> For example, industries, in which delivered costs are higher for inputs than for downstream products, can result in smaller geographic markets for upstream purchases than for downstream sales.

### C. Monopsony in labor markets.

Recent articles and commentary have suggested that market concentration among purchasers of labor is a cause of income inequality and low real wage growth in the United States.<sup>93</sup> Some of those in support of this view suggest that markets for labor are often more concentrated than downstream product markets and/or that individual employers can be wage setters.<sup>94</sup>

The Section commends the agency's increased focus on labor markets over the past few years, but also encourages the Commission to examine carefully how antitrust enforcement, outside of the context of naked no-poach agreements, should be applied in labor purchasing markets, which raise complex questions about market definition, market power, and competitive effects. For example, worker skill sets may be fungible across multiple employers that are not competitors in downstream product markets thus creating the potential for broadly defined markets and low levels of concentration, but also creating blind spots for firms that do not necessarily see other firms as horizontal competitors in the purchase of labor, even when these firms are customers or suppliers.

In addition, employers compete for workers on many non-wage dimensions such as work hours and flexibility, career advancement prospects, quality of the workplace, commuting

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<sup>93</sup> See, e.g., Ioana Marinescu, *Fighting monopsony, a lack of competition harms workers* (Harvard Law, June 2018), [https://lwp.law.harvard.edu/files/lwp/files/webpage\\_materials\\_papers\\_marinescu\\_june\\_13\\_2018.pdf](https://lwp.law.harvard.edu/files/lwp/files/webpage_materials_papers_marinescu_june_13_2018.pdf); Kevin Caves & Hal Singer, *When the Econometrician Shrugged: Identifying and Plugging Gaps in the Consumer Welfare Standard*, GEO. MASON L. REV. (forthcoming 2018); Lina Khan & Sandeep Vaheesan, *How America became uncompetitive and unequal*, WASH. POST (June 13, 2014) (arguing that lax antitrust enforcement creates inequality by enabling employers to drive down worker wages and transfer wealth from workers to affluent executives and shareholders).

<sup>94</sup> See Ioanna Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets* 7 (Univ. of Penn., Inst. for Law & Econ. Research Paper No. 18-8, 2018) (“the markets in which firms purchase labor are often significantly more concentrated than the markets in which they sell their products”); Douglas Staiger, Joanne Spetz, & Ciaran S. Phibbs, *Is There Monopsony in the Labor Market? Evidence from a Natural Experiment*, 28 J. LAB. ECON. 211, 213 (2010) (finding that Veterans Administration hospitals are wage setters in the registered nurse labor market).

convenience/location, and benefits. The Commission should thus be careful to consider all of these factors, in addition to observed differences in wages, in assessing the impact of potentially anticompetitive conduct on labor markets. The Commission should also study and explain what unilateral conduct could be considered exclusionary in labor purchasing markets as much of the recent discussion about labor purchasing markets has focused on collusive joint conduct.

Finally, the issues of real wage increases and income inequality are confounded by many non-antitrust factors, leading some to conclude that antitrust is poorly equipped to address such issues.<sup>95</sup> Thus, while the Section is pleased that the Commission has included labor market monopsony in its agenda, there is much analytical work that must first be done in this area before making any commitment to address income inequality or wage levels through monopsony enforcement in labor purchasing markets.

#### **D. Impact of non-compete agreements.**

Covenants not to compete that are ancillary to the sale of a business or to an employment contract in which the employer shares trade secrets with an employee or invests significantly in the employee's training are often upheld so long as they are reasonable in geographic and temporal scope. Some have suggested, however, that when used by dominant firms or by the majority of firms in an industry, such agreements can have anticompetitive market-wide effects. It would be

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<sup>95</sup> See *The Consumer Welfare Standard in Antitrust: Outdated, or a Harbor in a Sea of Doubt?*: Hearing Before the Subcomm. on Antitrust, Consumer Prot. and Consumer Rights of the S. Comm. on the Judiciary, 115th Cong. 2 (2017) (opening statement of Carl Shapiro, Professor of Business Strategy, University of California, Berkeley), <https://www.judiciary.senate.gov/imo/media/doc/12-13-17%20Shapiro%20Testimony.pdf> (“Antitrust also is poorly suited to address issues of income inequality. Many other public policies are far superior for this purpose. Tax policy, government programs such as Medicaid, disability insurance, and Social Security, and a whole range of policies relating to education and training spring immediately to mind. So, while stronger antitrust enforcement will modestly help address income inequality, explicitly bringing income distribution into antitrust analysis would be unwise.”)

useful for the Commission to consider whether such agreements are being used routinely in certain industries without justification and whether this should be a topic of increased enforcement focus. The Commission may also consider whether employees' fear of liability for breach or competitors' fear of liability for tortious interference with such agreements can lead to an overall softening of competition among firms for each other's employees.

#### **E. Merger enforcement.**

The Section encourages the Commission to study further the impact of mergers on buyer power and monopsony. Although the agencies have experience in analyzing the monopsony effects of mergers, especially in agriculture<sup>96</sup> and in mergers between health insurers,<sup>97</sup> such issues tend to be less commonly raised than concerns about sell-side market power. The Horizontal Merger Guidelines, however, recognize that mergers can create monopsony power, and advise that the agencies do not "evaluate the competitive effects of mergers between competing buyers strictly, or even primarily, on the basis of effects in the downstream markets in which the merging firms sell."<sup>98</sup> In addition, parties often view purchasing cost reductions and reductions in redundant labor to be efficiencies. If the Commission is to take a position that such effects are anticompetitive harms in

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<sup>96</sup> See e.g., Complaint at 3, *United States v. Tyson Foods, Inc.*, No. 14-cv-1474, 2014 WL 4249929 (D.D.C. Aug. 27, 2014) (alleging in a case that was settled by consent order that the acquisition of a competing buyer would harm competition in the market for "purchase of sows from farmers").

<sup>97</sup> See, e.g., *United States v. Anthem Inc.*, 855 F.3d 345, 351 (D.C. Cir. 2017) ("Plaintiffs also alleged that the merger would substantially lessen competition for the purchase of services from healthcare providers in the 35 local markets by giving the combined company anticompetitive buying power."). Although the merger was enjoined on other grounds, Judge Kavanaugh, while dissenting from the affirmance of the injunction, would have remanded because "the exercise of monopsony power to temporarily reduce consumer prices does not qualify as an efficiency that can justify an otherwise anticompetitive merger." *Id.* at 377 (Kavanaugh, J., dissenting). Indeed, as others have observed, benefits premised on a reduction in competition are simply not cognizable. Hemphill and Rose, *supra* note 90, at 2106.

<sup>98</sup> U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines §12 (2010).

buy-side markets, it should provide clear guidance as to the circumstances when reductions will be considered anticompetitive effects as opposed to cognizable efficiencies.<sup>99</sup>

**Topic 8: The role of intellectual property and competition policy in promoting innovation [submitted jointly with the Section of Intellectual Property Law]**

**A. Intellectual property and market power.**

The intersection of antitrust and intellectual property is, and has been for many years, an important and hotly debated area of law. It is generally accepted that the ownership of a patent is not presumed to create market power. However, it is also accepted that certain types of conduct with respect to intellectual property may have anticompetitive effects.

The 2017 DOJ/FTC IP Licensing Guidelines clarify that the agencies and courts agree that ownership of an intellectual property right (“IPR”) – patent, trademark, or copyright – is not presumed to create market power.<sup>100</sup> However, avoiding the presumption of market power does not make IPR inherently protected from the antitrust laws. Rather, the Guidelines also highlight that the agencies and courts agree IPRs do not provide complete protection for IPR owners from the antitrust laws, noting that “certain types of conduct with respect to intellectual property may have anticompetitive effects against which the antitrust laws can and do protect.”<sup>101</sup>

Although multiple conduct types described in the Guidelines could have anticompetitive effects under some circumstances, the following types in particular could benefit from additional

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<sup>99</sup> See generally *Anthem*, 855 F.3d at 349 (discussing the role of efficiencies and particularly cost savings in a merger case).

<sup>100</sup> U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 4 (2017), <https://www.justice.gov/atr/IPguidelines/download> [hereinafter 2017 IP LICENSING GUIDELINES]; *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

<sup>101</sup> 2017 IP LICENSING GUIDELINES, 3.



guidance from the FTC as to their implications for innovation (many of which are discussed below): (1) unilateral refusals to license; (2) acquisitions involving IPRs; (3) the international impact of extraterritorial remedies; and (4) reverse payments and emerging issues related to pharmaceutical patents.

## **B. Unilateral refusals to license.**

The FTC and DOJ Antitrust Division 2002 hearings on Competition and Intellectual Property Law<sup>102</sup> explored in depth the circumstances, if any, under which courts should impose antitrust liability for a refusal to license a patent. The agencies' subsequent 2007 report, which summarized the hearings, devoted a chapter to this topic,<sup>103</sup> looking at case law available at the time,<sup>104</sup> and collecting views presented during the hearings. The report concluded that "[a]ntitrust liability for mere unilateral, unconditional refusals to license patents will not play a meaningful part in the interface between patent rights and antitrust" noting that "[a]ntitrust liability for refusals to license competitors would compel firms to reach out and affirmatively assist their rivals, a result that is 'in some tension with the underlying purpose of antitrust law.'" On the other hand, the report found that "[c]onditional refusals to license that cause competitive harm are subject to antitrust liability."<sup>105</sup>

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<sup>102</sup> U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, COMPETITION AND INTELLECTUAL PROPERTY LAW AND POLICY IN THE KNOWLEDGE-BASED ECONOMY (2002), <https://www.ftc.gov/news-events/events-calendar/2002/02/competition-ip-law-policy-knowledge-based-economy-hearings>.

<sup>103</sup> U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 20 (2007), <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/222655.pdf>.

<sup>104</sup> *Image Technical Services, Inc. v. Eastman Kodak Co.* 125 F.3d 1195 (9th Cir. 1997); *In re Independent Service Organizations Antitrust Litigation*, 203 F.3d 1322 (Fed. Cir. 2000).

<sup>105</sup> ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION, *supra* note 102, at 6, 30.

The Guidelines state that “intellectual property owner’s rights to exclude are similar to the rights enjoyed by owners of other forms of private property” and note that “antitrust laws generally do not impose liability upon a firm for a unilateral refusal to assist its competitors, in part because doing so may undermine incentives for investment and innovation.” The Sections have long agreed with that approach; but given the passage of time since the 2002 hearings and the 2007 report, the FTC might wish to see if anything has changed or whether, as the Sections believe, that approach should be reconfirmed.

**C. The international impact of extraterritorial remedies.**

The Sections encourage the Commission to evaluate the cross-border impact of extraterritorial remedies in matters involving IP and how to strike the balance in this area with an eye to innovation effects.

Antitrust authorities should have the ability to identify competition law violations that affect substantial harm upon their domestic consumer welfare, and to implement measures that alleviate such harm. In an increasingly complex global antitrust enforcement landscape, however, agencies can no longer implement remedies without considering their implications outside their borders and without due regard for the concerns of foreign jurisdictions and the rights of those foreign jurisdictions to regulate their own commerce according to their domestic enforcement principles. Extraterritorial remedies imposed by competition authorities with different substantive enforcement standards may create a significant risk of conflict among jurisdictions and an infringement of the sovereign right of nations to regulate their own domestic commerce.

The 2017 Antitrust Guidelines for International Enforcement and Cooperation acknowledge that competition law enforcers must take into account the significant interests of foreign sovereigns prior to enacting any remedy that may conflict with those interests.<sup>106</sup> In doing so, comity dictates that enforcers review not only the degree of direct conflict with foreign laws, but also (i) the articulated interests and policies of other governments, and (ii) whether objectives sought to be obtained through competition law enforcement could be achieved by foreign enforcement.

Intellectual property rights are among the interests subject to adverse effects from the lack of comity. In matters involving intellectual property, jurisdictions should be vigilant to respect the legitimate interests of other sovereigns with different competition laws.

For instance, the European Commission's two enforcement actions regarding standard essential patents—one involving Motorola and the other involving Samsung—illustrate appropriate limits on intellectual property remedies, consistent with principles of international comity.<sup>107</sup> Specifically, the Commission's decisions<sup>108</sup> limit the parties' ability to seek injunctive relief on FRAND-assured standard essential patents only with respect to the European Economic Area and only on patents issued in Europe. The decisions, as a result, do not reach foreign patents outside the

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<sup>106</sup> U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION 27-29, 47-49 (2017), <https://www.justice.gov/atr/internationalguidelines/download> (stating that extraterritorial remedies must be "consistent with the Agency's international comity analysis").

<sup>107</sup> See Case AT.39985, Motorola Mobility LLC Enforcement of GPRS Standard Essential Patents, C (2014) 2892, [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39985/39985\\_928\\_16.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf); see also Case AT.39939, Samsung Elecs. Co., Commitments Offered to the Eur. Comm'n, C (2013) 3/39.939, [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39939/39939\\_1301\\_5.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1301_5.pdf).

<sup>108</sup> In the case of Samsung, the Commission decision (pursuant to Article 9 of Regulation (EC) No 1/2003) was the result of commitments that Samsung offered to address the alleged competition concerns.

European Economic Area. By contrast, the Korean KFTC's 2016 decision against Qualcomm would appear to impose a remedy that requires the target to alter its conduct on a global basis.<sup>109</sup>

**D. Reverse payments and emerging issues related to pharmaceutical patents.**

Reverse payments have been a priority since the Commission began pursuing these issues around 2000.<sup>110</sup> The basic issue is that brand pharmaceuticals and generics often settle patent infringement cases, and under some circumstances, such settlements are found to present antitrust concern by delaying the entry of lower cost generic alternatives. In 2013, the *Actavis*<sup>111</sup> decision resolved a circuit split over judicial treatment of reverse payments and settled on application of the rule of reason to these arrangements. Following extensive efforts by the Commission in a number of cases, the Court concluded that “a reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects” and, thus, can violate the antitrust laws.

While clarifying many issues, *Actavis* left continuing ambiguity in at least two areas. The first is with regard to non-cash settlements. Federal appellate courts have expanded the scope of antitrust liability to include non-cash reverse payment settlements for patent infringement between

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<sup>109</sup> Case No. 2015SiGam2118, *In re Alleged Abuse of Market Dominance of Qualcomm Inc.*, 2017-0-25, [http://www.theamericanconsumer.org/wp-content/uploads/2017/03/2017-01-20\\_KFTC-Decision\\_2017-0-25.pdf](http://www.theamericanconsumer.org/wp-content/uploads/2017/03/2017-01-20_KFTC-Decision_2017-0-25.pdf) (the KFTC asserted that “[T]he illegal conduct of [Qualcomm has] been carried out not only against the Korean enterprises and the Korea-registered patents in the territory of Korea, but also in the remaining parts of the world, in the same way and at the same time. The effects of the illegal conduct influence overseas markets as well as the domestic market.” It concluded that “[I]t is reasonable not to limit the [remedial measures] and the scope of application only to the territory of Korea and the Korea-registered patents, in order to effectively remove the anticompetitive effects influencing the Korean market”

<sup>110</sup> See, e.g., *In re Abbott Labs.*, No. C-3945, 2000 WL 681848 (F.T.C. May 22, 2000).

<sup>111</sup> *FTC v. Actavis*, 570 US 756 (2013).

branded and generic pharmaceutical manufacturers.<sup>112</sup> The second issue is whether settling parties are allowed to introduce evidence of the patent merits in arguing that a payment is justified by the strength of the patent. A hurdle to introducing such evidence is *Actavis* itself; some decisions support analysis that does not rely on the patent merits.<sup>113</sup> Other post-*Actavis* issues include pleading requirements, causation, and state law issues.

Product hopping is another antitrust focus in the pharmaceutical context that may require more clarity. This behavior involves the introduction of a line extension before generic competition takes place, allowing patients to switch from old product line to line extension for which there may be no automatic substitution in the generic line extension. The issues most often are whether the change is a product improvement (rather than just a device to inhibit generic entry) and whether the original product has been removed from the market. The cases in product hopping suggest that further clarification is needed.<sup>114</sup>

Risk Evaluation and Mitigation Strategies (“REMS”) program in the Food and Drug Administration Amendments Act of 2007 is another area that presents potential antitrust issues that would benefit from further clarification. REMS programs are intended to provide special safety measures and requirements for drugs that the U.S. FDA deems to present a grave risk of danger if misused or mishandled. Yet brands have often used REMS programs to delay or prevent generic

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<sup>112</sup> *In re* Loestrin24 Fe Antitrust Litigation, 814 F.3d 538 (1st Cir. 2016); *King Drug Co. of Florence, Inc. v. SmithklineBeecham Corp.*, 791 F.3d 388 (3d Cir. 2015).

<sup>113</sup> *Time Insurance v. AstraZeneca*, 52 F. Supp. 705 (E.D. Pa. 2014).

<sup>114</sup> *See, e.g., Mylan Pharm. v. Warner Chilcott Pub.*, 838 F.3d 421 (3d Cir. 2016); *New York v Actavis plc*, 787 F.3d 638(2d Cir. 2015); *In re Suboxone (Buprenorphine Hydrochloride and Naloxone) Antitrust Litig.*, 64 F Supp3d 665 (E.D. Pa .2014). For the FTC’s view see Brief for the Fed. Trade Comm’n as Amicus Curiae, *Mylan Pharm. v. Warner Chilcott Pub.*, No. 15-2236 (3d Cir., Sept. 30, 2015).

entry by denying samples to generics so that they cannot do the bioequivalency studies necessary for FDA approval.<sup>115</sup>

**E. Standards essential patents.**

The Sections continue to believe that the treatment of standards essential patents in competition cases presents a range of significant issues. The Sections expect to provide the Commission with a paper devoted to these issues during the course of these hearings.

**Topic 9: The consumer welfare implications associated with the use of algorithmic decision tools, artificial intelligence, and predictive analytics.**

Algorithmic decision tools, artificial intelligence, and predictive analytics may not be easily distinguishable from long-practiced ways of doing business. Artificial intelligence, for example, is sometimes defined as the ability of machines to do what was formerly only within the purview of human intelligence. Facial recognition is one example. By that definition, almost any progress in machine capability becomes artificial intelligence. Vast amounts of data, vastly greater computational power, and new methods of machine learning are changing the way that businesses operate and consumers make decisions. Many of these technologies also have powerful implications regarding privacy, security, competition, and data ownership. It is appropriate for the FTC to examine the consumer welfare implications of these new technologies, and to be concerned about potential government over-reach in its policing of these new technologies.

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<sup>115</sup> See Scott Gottlieb, Commissioner of Food & Drugs, Remarks at the Fed. Trade Comm'n: Understanding Competition in Prescription Drug Markets (Nov. 8, 2017), <https://www.fda.gov/newsevents/speeches/ucm584195.htm>. The Commission has weighed in on these issues in an amicus brief. See Brief for the Fed. Trade Comm'n as Amicus Curiae, *Mylan Pharm. v. Celgene Corp.*, No. 2:14-CV-2094 (D.N.J. June 17, 2014).

The use of computer algorithms to automate a firm's pricing and output decisions is evolving quickly. Such tools currently determine which consumers receive on-line discount offers, set fares charged by Uber drivers, and make buy-sell decisions regarding commodities and financial assets. Not surprisingly, this topic is starting to receive substantial attention from antitrust commentators.

Algorithmic pricing can enhance competition, by facilitating rapid response to changing competitive conditions and customer demand. Enhanced price discovery and dissemination – the crucial function of the price system itself – is likely to make markets more efficient and competitive.

On the other hand, some have suggested that the use of algorithms may facilitate collusion and make cartels more stable, and have argued that antitrust rules need to adapt. The exchange of information for the purpose of coordinating pricing and restricting output might be easier in the cyber world and perhaps easier to hide as well.<sup>116</sup> Others, including senior government officials, have noted that, while antitrust authorities need to be vigilant, existing rules can be used to control misuse and the concerns raised are alarmist.<sup>117</sup>

Computer-determined pricing may be susceptible to coordination, just as human determined pricing can be, and antitrust law already has confronted this issue. In *United States v. Airline Tariff Publishing Co.* (836 F. Supp. 9 (D.D.C. 1993)), airlines settled accusations that they used a jointly

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<sup>116</sup> See ARIEL EZRACHI & MAURICE STUCKE, VIRTUAL COMPETITION, THE PROMISE AND PERILS OF THE ALGORITHM-DRIVEN ECONOMY (2016); JOSEPH HARRINGTON, WHARTON SCHOOL, DEVELOPING COMPETITION LAW FOR COLLUSION BY AUTONOMOUS ARTIFICIAL AGENTS (2018).

<sup>117</sup> See, e.g., Maureen Ohlhausen, Acting Chairman, Fed. Trade Comm'n, Remarks from the Concurrences Antitrust in the Financial Sector Conference: Should We Fear the Things that Go Beep in the Night? Some Initial Thoughts on the Intersection of Antitrust Law and Algorithmic Pricing (May 27, 2017); Andrew Finch, Acting Ass't Attorney General, Antitrust Division, Remarks at the 44th Annual Conference on International Law and Policy (Sept. 14, 2017); see also OECD, ALGORITHMS AND COLLUSION: NOTE BY THE UNITED STATES (2017), [https://one.oecd.org/document/DAF/COMP/WD\(2017\)41/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2017)41/en/pdf).

owned computerized online booking system to communicate and set collusive airline fares. More recently, in *United States v. Topkins* (N.D. Cal. 2015) and *United States v. Aston* (N.D. Cal. 2015), the DOJ alleged a conspiracy to fix prices of posters sold online through an agreement to adopt a complex pricing algorithm to automatically coordinate poster prices. And major financial institutions and individuals have been charged with colluding through an online chatroom to manipulate foreign currency exchange rates.

Just as competitors cannot communicate directly to set prices or restrict output, they also cannot use an intermediary, in a “hub-and-spoke” fashion, to reach such an unlawful agreement. Absent agreements and concerted action, however, independent adoption of pricing algorithms may be beyond the reach of antitrust law, even if they may make interdependent pricing more likely. *E.I. duPont de Nemours & Co. v. FTC* (2d Cir. 1984) teaches that unilateral conduct, even in an oligopolistic industry, can be labeled “unfair” under Section 5 of the FTC Act only if there is evidence of “anticompetitive intent or purpose” or “the absence of an independent legitimate business reason.” It may be useful for the FTC to review under what circumstances, if any, Section 5 could be used to challenge the use of these technologies that anticompetitively raise prices without clear evidence of an agreement among competitors.

**Topic 10: The interpretation and harmonization of state and federal statutes and regulations that prohibit unfair and deceptive acts and practices.**

Since the 1960s, all 50 states and the District of Columbia have enacted unfair and deceptive acts and practices (“UDAP”) statutes, collectively referred to as “Little FTC Acts.” Most state UDAP laws were initially intended as an extension of the FTC’s enforcement authority under Section 5 of the FTC Act. The laws complemented and expanded the FTC’s reach by providing the states and individual consumers with the authority to pursue consumer protection claims in state



courts.<sup>118</sup> Over twenty states have enacted specific legislation holding that the decisions of the FTC and federal courts are to be considered by their own state courts. Most states have entrusted enforcement authority for their UDAP laws to their attorneys' general offices, and all have provided for a private right of action.

Given the need to be responsive to the residents of their states, the need for efficient and effective enforcement due to budget limitations, and general state-federal agreements in many areas of enforcement, a mutually beneficial arrangement has evolved over the years between state attorneys general and the FTC whereby the institutional resources of the FTC provide for effective and responsive policy-setting on national issues, with input from all stakeholders, followed by enforcement not just by the FTC's own attorneys but also by or with their state level partners and private litigants. Nevertheless, significant areas of dissonance – both substantively and in enforcement – between state and federal laws and between and among the states themselves remain. In addressing the questions of whether the Commission can, and to what extent should, take steps to promote further harmonization between the FTC Act and similar statutes, it is appropriate to consider the current state of harmonization or lack thereof

Many of the divisions between state and federal enforcement of UDAP statutes are statutory in nature. For example, while all state statutes allow for a private right of action, some do not require a showing of injury; others allow for the recovery of attorneys' fees; and still others provide for statutory damages. This variation among state laws stands in contrast to the FTC Act which

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<sup>118</sup> Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practice Laws*, 81 ANTITRUST L.J. 911 (2017).

offers no private cause of action. Furthermore, some state statutes allow for a “least sophisticated” consumer standard, rather than the FTC’s reasonable consumer standard.

The evolution of the interpretation of the FTC Act’s prohibition on “unfair methods of competition” also is reflective of the dissonance in federal and state interpretations of consumer protection laws.<sup>119</sup> In 1964, the FTC set out a three-part test (the “Cigarette Rule”) to better characterize this scope when assessing whether an act or practice was unfair; specifically whether the practice: (1) offended public policy, (2) was immoral, unethical, oppressive or unscrupulous, and (3) caused substantial injury to consumers or competitors.<sup>120</sup> After years of conflicting applications of this standard, the scope of unfairness was defined by the FTC’s 1981 Unfairness Policy Statement (“FTC Policy Statement”).<sup>121</sup> The FTC Policy Statement outlined an “unfair practice” as one that is (1) substantial, (2) not reasonably avoidable, and (3) not outweighed by countervailing benefits to consumers or to competition,<sup>122</sup> and it solidified the Commission’s rejection of the Cigarette Rule.<sup>123</sup>

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<sup>119</sup> 15 U.S.C. § 45(a)(1).

<sup>120</sup> Matthew W. Sawchak & Troy D. Shelton, *Exposing the Fault Lines Under State UDAP Statutes*, 81 Antitrust Law Journal 903, 905 (2017).

<sup>121</sup> Elise M. Nelson & Joshua D. Wright, *Judicial Cost-Benefit Analysis Meets Economics: Evidence from State Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L.J. 997, 1006-7 (2017) [Nelson & Wright].

<sup>122</sup> Often referred to as a “cost-benefit analysis.”

<sup>123</sup> Letter from the Fed. Trade Comm’n to Senator Bob Packwood, Chairman of the Comm. on Commerce, Sci., and Transp. and Senator Bob Kasten, Chairman of the Subcomm. on Consumer, Comm. on Commerce, Sci., and Transp. (Mar. 5, 1982), *reprinted in* 1055 FTC Antitrust & Trade Reg. Rep. (BNA) 568–70.

Despite the Cigarette Rule’s long retirement from FTC doctrine, and although twenty-eight states have enacted legislation analogous to the Section 5 prohibition of unfair practices,<sup>124</sup> the clear majority of states apply unfairness criteria different from the FTC standard. Sixteen states continue to apply the Cigarette Rule criteria, despite provisions in their own consumer protection laws encouraging deference to federal interpretations of unfairness.<sup>125</sup> Some states employ a hybrid standard; two states, for example, continue to employ the Cigarette Rule, while also utilizing the Statement to better contextualize their “substantial injury” analysis.<sup>126</sup> At least seven states have been silent on the unfairness standard to be applied, including California, which is home to the most cases brought through state UDAP claims.<sup>127</sup>

Additional areas of divergence exist between state enforcement of UDAP statutes. For example, some attorneys general have secured the services of private attorneys to litigate under the *parens patriae* authority inherent to the state attorney general. Attorneys general have also been criticized for pursuing, both collectively and individually, areas that are already the subject of regulatory oversight by other agencies such as the FDA. States also differ significantly in the variety

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<sup>124</sup> David L. Belt, *Should the FTC’s Current Criteria for Determining ‘Unfair Acts or Practices’ Be Applied to State ‘Little FTC Acts’?*, ANTITRUST SOURCE 1 (Feb. 2010) [Belt].

<sup>125</sup> See, e.g., *Alaska v. O’Neil Investigations, Inc.*, 609 P.2d 520, 535 (Alaska 1980); *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So.2d 773, 777 (Fla. 2003); *Robinson v. Toyota Motor Credit Corp.*, 775 N.E.2d 951, 961 (Ill. 2002); *Hawaii Community Federal Credit Union v. Keka*, 11 P.3d 1, 16 (Ha. 2000). In 2015, the Montana Supreme Court cited the Cigarette Rule when interpreting its UDAP statute and suggested other state and federal courts do the same. *WLW Realty Partners, LLC v. Cont’ Partners VIII, LLC*, 360 P.3d 1112, 1118 (Mont. 2015).

<sup>126</sup> See, e.g., *Glazer v. Dress Barn, Inc.*, 873 A.2d 929, 959–60 (Conn. 2004); *Blake v. Fed. Way Cycle Ctr.*, 698 P.2d 578, 583 (Wash. App. 1985).

<sup>127</sup> Nelson & Wright, *supra* note 121, at 1009.

and strength of the remedial options available to them under their individual UDAP statutes, including civil penalties.

While many of the variations are either statutory in nature or the result of developing case law in each jurisdiction and efforts to harmonize the substantive standards would involve a significant challenge across state legislatures with unforeseeable consequences, there is an opportunity for FTC leadership at least with respect to those state statutes that require consideration of and/or deference to FTC decisions. The Section recommends that the FTC conduct a review of enforcement under these state laws to determine which are at variance with FTC authority and consider the propriety of preparing a comprehensive report regarding any variations in application that appear to be substantively inconsistent with the application of the FTC's established law and enforcement policy. Such report could then, in and of itself, be authority for consideration by state courts and enforcing authorities.

In addition, while the FTC Act and state UDAP laws provide the substantive legal basis for pursuing enforcement actions in these areas, those in violation of these laws are often difficult to locate or reside beyond state or national boundaries. The FTC's efforts may therefore initially be best directed to formally coordinating with state (and in some cases, international) enforcement authorities, industry stakeholders and consumer groups regarding the most effective ways to take on such rising threats, perhaps establishing national policy standards and spearheading widespread enforcement initiatives. Such efforts could in turn produce more consistent enforcement resolutions and guidance for consumer-facing companies challenged with compliance with multiple, but often

slightly different state laws, and, more importantly, protect consumers from problems that individual states may be challenged to solve on their own.<sup>128</sup>

Privacy represents another prime area for the FTC's efforts in coordinating dialogue among the various stakeholders as other countries and the states are taking steps to enact their own privacy laws. Indeed, in the area of digital privacy, the capacity of the states to act as "laboratories of democracy" has been on full display. California enacted the first data breach notification law in 2002, and within 15 years all 50 states and the District of Columbia followed suit.

As an initial step, the FTC should consider an in-depth survey of the current national landscape of data and privacy laws, regulation, and enforcement, with an eye towards refining the role of the FTC (*i.e.*, how can the FTC actions best complement private and state efforts) within the current regulatory regime. This in turn would provide a base point for any Congressional effort to examine the creation of a more coordinated national privacy and data policy framework. At a minimum, a national survey would provide valuable information to companies struggling to meet varying laws and standards.

#### **Topic 11: The Agency's investigation, enforcement and remedial processes.**

##### **A. Reducing unnecessary regulatory burden.**

In 2017, Acting Chairman Maureen K. Ohlhausen announced the formation of internal working groups within the Bureaus of Competition and Consumer Protection to streamline demands

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<sup>128</sup> The drafters recognize that state attorneys general routinely work together on consumer protection multistate enforcement matters that transcend individual state borders and that the FTC and the states often coordinate enforcement on issues of national importance. This proposal builds on that concept and suggests a more long-term and consistent coordination both across states and between state and federal enforcers (and possibly international enforcers) to ensure the greatest coordinated and comprehensive impact on some of the most widespread, difficult-to-tackle consumer enforcement issues of the day.

for information in investigations and to eliminate unnecessary costs to companies and individuals who receive them.<sup>129</sup> The working groups were charged with considering factors intended to improve efficiency and reduce regulatory burden.

The formation of these working groups is the direct result of a common understanding: the cost of complying with agency CIDs and second requests is substantial and the time required to comply extensive.<sup>130</sup> As electronic communications continue to grow, so does the compliance burden. Consistent with the direction provided by then-Chairman Ohlhausen, the Section endorses evaluation of agency processes to reduce unnecessary regulatory burden. More specifically, wherever practicable, the Section endorses proposals to (1) continue the Commission's efforts to reduce the minimum number of custodians identified as potential sources of responsive information, (2) narrow the relevant time period and geographic scope for responsive information, and (3) rely on targeted specifications rather than broad language requiring time-consuming and expensive production efforts (e.g., specifications demanding "all documents that refer or relate" when "documents sufficient to show" would suffice). We note that the Commission has made strides towards these objectives in recent years and urges those efforts to continue.

The Section also endorses former Chairman Ohlhausen's proposal to integrate the views of the Bureau of Economics "earlier in [FTC] consumer protection investigations to better inform

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<sup>129</sup> Maureen K. Ohlhausen, Acting Chairman, Fed. Trade Comm'n, Remarks at the Watergate Hotel: The FTC at 100 Days (May 3, 2017).

<sup>130</sup> Peter Boberg & Andrew Dick, *Findings from the Second Request Compliance Burden Survey*, XIV MERGERS AND ACQUISITIONS COMMITTEE NEWSLETTER 26 (2014), <http://www.crai.com/publication/findings-second-request-compliance-burden-survey>; Scott Sher & Daryl Teshima, *The Increasing Burden Associated with Electronic Document Production in Second Request Investigations*, ANTITRUST SOURCE (Nov. 2005), <https://www.wsgr.com/PDFSearch/sher1105.pdf>.

agency decisions about the potential effects of enforcement actions.”<sup>131</sup> The Section shares the view that earlier involvement of the Bureau of Economics will lead to greater focus on practices that cause actual consumer harm. Finally, the Section urges the Commission to provide an update regarding the progress of these internal working groups and to incorporate information derived from these hearings into the working groups’ findings and recommendations.

**B. Agency clearance process.**

It is long past time for the agencies to publish and abide by a system that resolves clearance battles within no more than nine or ten days.<sup>132</sup> Delays are still all too common; while harmful in and of themselves, they also sometimes give rise to unnecessary second requests as the 30-day deadline approaches before clearance has been resolved. The Section also urges the FTC to publish statistics each quarter as to the average time for clearance, the number of times both agencies sought clearance on the same deal or investigation, and the number of times a dispute had to be escalated to more senior managers in the agency.

The Section also believes that the public would benefit from significantly greater transparency on Hart-Scott-Rodino clearance decisions.<sup>133</sup> The agencies have provided significant guidance regarding the overall HSR review process, but the clearance process between the agencies prior to the substantive review remains unclear since the 2002 Clearance Memorandum of Agreement was abandoned. The Section recommends that, even without a formal agreement as to

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<sup>131</sup> *Id.* at 8.

<sup>132</sup> *See* AMC Report, *supra* note 5 at 129-37.

<sup>133</sup> Parties filing an HSR pre-merger notification filing are always happy to receive a letter from the PNO office acknowledging that their HSR filings had been accepted, but then they are often disappointed when there is silence until the transaction is cleared or the investigating Agency requests additional information.

how the process works, the agencies should at least provide additional guidance regarding the current process. There have been recent mergers where, for example, the merging parties compete in a market traditionally handled by one agency, but nevertheless engendered a clearance fight because one input was from a market handled by the other agency.<sup>134</sup>

Filing parties, and the public in general, have limited insight into how the actual clearance decisions between the FTC and the DOJ are made and almost no insight into how disputes are resolved. Even after the transaction has been cleared to one agency or the other, the filing parties are given no insight into what occurred during the clearance process. With regard to specific transactions there may be reasons to keep the clearance discussion confidential, but there is no reason that the public should not have insight into which industries are covered by the FTC and which are covered by DOJ – insight that can be critical when parties are planning advance outreach in the hopes to work with the agency to ensure timely termination of the HSR waiting period. Especially with the recent more liberalized usage of email communications, filing parties would also benefit greatly from being notified on a timely basis that clearance has been granted which Agency will be reviewing and/or investigating the transaction and could prepare accordingly.

### **C. Part 3 proceedings.**

“The FTC’s Part 3 authority is a powerful tool for developing or clarifying the law.”<sup>135</sup> Yet, over time, the FTC has brought far fewer Part 3 cases – 94 cases during the period 1977 to 1986

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<sup>134</sup> The agencies would also do well to get rid of the “no cite” rule – under which, as a condition for clearance, the prevailing agency agrees not to cite the matter as prior experience in future clearance disputes. This rule only perpetuates gamesmanship.

<sup>135</sup> Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?* JOURNAL OF COMPETITION LAW & ECONOMICS 19 (2016), <https://www.ftc.gov/public-statements/2016/11/administrative-litigation-ftc-effective-tool-developing-law-or-rubber>.



compared to 12 during the period 2007 to 2016.<sup>136</sup> The Section urges the Commission to consider the reasons behind this trend and to take steps to ensure the Part 3 process fulfills the role intended by Congress when it was created.

The Section also suggests that the FTC address due process concerns and perceptions of potential bias, given that the Commission serves prosecutorial and adjudicative roles, particularly in hearing appeals of its own cases.

Improving the transparency of the Part 3 process would be a positive step in this direction. The FTC E-Filing System does not function with the same efficiency or effectiveness as the federal court's PACER system. If complete sets of filings are posted to the FTC website (the only resource where any filings are made available), they are not posted for days or even weeks after they are filed. In 2018, when so many other agencies, and all of the federal court system have moved to online docket access, non-parties should not be expected to physically inspect public filings at the FTC to follow cases. Increasing transparency narrows the knowledge gap between the FTC staff and the parties and the public in a way that can enhance understanding and confidence in the process and outcomes.

The Section also encourages the FTC to provide additional guidance and transparency regarding the ALJ's role, the Commission's role, and the different standards applied at the various stages in the Part 3 process. Currently, the Commission examines the available evidence and considers the allegations both in deciding whether or not to issue a complaint and in hearing appeals from the ALJ. To the extent that the Commission is applying different standards at those different

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<sup>136</sup> *Id.* at 11.

stages in the process, those differences should be clear and readily understandable. In addition, the Section also encourages the FTC to provide more guidance regarding the extent to which the role of the ALJ differs from the role of the Commission as an appellate body.<sup>137</sup>

#### **D. Advertising Industry Self-Regulation.**

The FTC has long supported advertising industry self-regulation as a means of promoting truthfulness and accuracy in advertising. Numerous commissioners – including Mary Gardiner Jones,<sup>138</sup> Robert Pitofsky,<sup>139</sup> Deborah Platt Majoras,<sup>140</sup> and Maureen Ohlhausen,<sup>141</sup> among many others – have heralded the success of self-regulation in this space.

The Section has also been a consistent supporter of advertising self-regulation, including as an active participant in helping to shape the policies and procedures that have made industry self-regulation so successful. For example, in 2014 and 2015, the Section’s Advertising Disputes &

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<sup>137</sup> The Executive Order Excepting Administrative Law Judges from the Competitive Service issued on July 10, 2018 and the Supreme Court’s decision in *Lucia v. Securities and Exchange Commission*, No. 17-130 (June 21, 2018), are both relevant to this analysis.

<sup>138</sup> See E. Zanol, *The National Advertising Review Board, 1971-1976*, 22 ASS’N FOR EDUC. IN JOURNALISM (1979).

<sup>139</sup> See Wally Snyder, *Ethics in Advertising: Making the case for doing the right thing* (2016); see also Press Release, Fed. Trade Comm’n, *Self-Regulation and Antitrust: FTC Chairman Lays Out How Self-Regulatory Effort Can Avoid Antitrust Challenge* (Feb. 18, 1998), available at <https://www.ftc.gov/news-events/press-releases/1998/02/self-regulation-and-antitrust>.

<sup>140</sup> See “*Advertising Resolutions For The New Year*,” Remarks of Deborah Platt Majoras Chairman, Federal Trade Commission, Association of National Advertisers (Jan. 17, 2007), available at <http://www.ftc.gov/speeches/majoras/070117adresnewyear.pdf>.

<sup>141</sup> Commissioner Maureen K. Ohlhausen, *Success in Self-Regulation: Strategies to Bring to the Mobile and Global Era BBB Self-Regulation Conference* June 24, 2014 (“In the advertising industry, the ASRC is a key example of a self-regulation success story. Created by the advertising industry, and administered by the BBB to ensure independence, the ASRC sets standards for truth and accuracy in advertising that are enforced by the National Advertising Division (NAD) and appealed to the National Advertising Review Board (NARB).”).

Litigation Committee and Consumer Protection Committee convened a Working Group comprised of numerous individuals representing consumer product companies, industry associations, and advertising law practices with the objective of preparing a comprehensive assessment of the state of advertising self-regulation, including recommendations for improvement.<sup>142</sup> In September 2015, the Advertising Self-Regulatory Council (ASRC) implemented nearly all of these recommendations and praised the Working Group for its “thoughtful recommendations on possible improvements to the [National Advertising Division “NAD”] process.”<sup>143</sup>

The Section believes that industry self-regulation is vital to efficiently promoting truthful and accurate advertising and recommends that the Commission continue to support industry self-regulation. This includes consideration of a company’s voluntary participation and compliance record before the NAD and NARB when the FTC staff is considering cases and determining an appropriate remedy in enforcement actions. The Section also recommends that the Commission act promptly when matters are referred to the FTC by the NAD and the NARB, and report periodically on the disposition of these referrals.

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<sup>142</sup> See *Self-Regulation of Advertising in the United States: an Assessment*, Prepared by Advertising Disputes & Litigation Committee and Consumer Protection Committee of the American Bar Association’s Section of Antitrust Law (Apr. 2015).

<sup>143</sup> ASRC Notice of Revisions to the NAD/CARU/NARB Procedures, Effective 11.1.15.

## **APPENDIX**

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